84-757

No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Petitioner,

—against—

EDWARD I. KOCH, as Mayor of the City of New York, THE CITY OF NEW YORK, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, NEW YORK CITY OFF-TRACK BETTING CORPORATION, BOARD OF EDUCATION OF THE CITY OF NEW YORK, BOARD OF HIGHER EDUCATION, CITY UNIVERSITY OF NEW YORK, NEW YORK CITY HOUSING AUTHORITY, TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, STATEN ISLAND RAPID TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, THE LONG ISLAND RAILROAD COMPANY, METROPOLITAN SUBURBAN BUS AUTHORITY, and CONSOLIDATED RAIL CORPORATION,
Respondents.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Petitioner,

—against—

MORRIS GOLDSTEIN and RUTH GOLDSTEIN,
Respondents.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Petitioner,

—against—

SEYMOUR GILLMAN, Trustee in Bankruptcy for SHERRY TOBACCO COMPANY, INC., and CLAREMONT-MADISON TOBACCO CORP.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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November 9, 1984

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QUESTION PRESENTED

Under the constitutional guaranty of due process may offensive collateral estoppel effect be given to one finding against a defendant, who is faced with multiple claims arising from a single incident, when that finding is contradicted by a number of findings in the defendant's favor?

Consolidated Edison Company of New York, Inc. ("Con Edison") is the defendant in more than 300 actions claiming damages of over $130,000,000 by reason of the July 1977 city-wide blackout. Offensive collateral estoppel effect on the issue of the degree of Con Edison's culpability has been given to a jury verdict against Con Edison that awarded the plaintiff $40,500 on a claim of $81,000. The jury verdict is contradicted by findings in Con Edison's favor made by judges on each other occasion the issue has been tried.

PARTIES BELOW

The parties participating below in *Koch* were Edward I. Koch, as Mayor of the City of New York, the City of New York and the fourteen public benefit agencies named in the caption, and Con Edison.

The parties participating below in *Goldstein* were Morris Goldstein and Ruth Goldstein and Con Edison.

The parties participating below in *Gillman* were Seymour Gillman ("Gillman"), as Trustee in Bankruptcy for Sherry Tobacco Company, Inc. and Claremont-Madison Tobacco Corp., and Con Edison.

Pursuant to Rule 28.1 of the Rules of the Court, Con Edison states that it is an electric utility, incorporated under the N.Y. Transportation Corporations Law, and that it has no parents, subsidiaries or affiliates.

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OPINIONS BELOW

In the three actions that are the subject of this petition, the plaintiffs seek to recover against Con Edison for damages sustained during the city-wide electrical blackout that occurred on July 13-14, 1977. They contend that Con Edison is collaterally estopped from litigating the issue of the degree of its culpability in causing the blackout by reason of the jury verdict against Con Edison affirmed in *Food Pageant, Inc.* v. *Consolidated Edison Co.*, 54 N.Y.2d 167 (1981).

The three appeals were briefed by Con Edison and argued together in the New York Court of Appeals. The collateral estoppel issue was decided against Con Edison in *Koch* and that decision was relied upon in *Goldstein* and *Gillman*.

The *Koch* decision is reported at 62 N.Y.2d 548, and is set forth in the appendix at 1a-12a. The unreported decisions of the Appellate Division and of Special Term are at appendix 33a-36a and 14a-32a. The memorandum decision of the Court of Appeals in *Goldstein* and *Gillman* is reported at 62 N.Y.2d 936 and is at appendix 13a. The decision of the Appellate Division in *Goldstein* is reported at 93 A D.2d 589 and is at appendix 47a-65a; the unreported decision of Special Term is at appendix 39a-44a. The unreported decisions of the Appellate Division and of Special Term in *Gillman* are at appendix 76a-77a and 68a-71a.

JURISDICTION

The orders of the court of appeals affirming the entry of partial summary judgment in each case against Con Edison on the issue of the degree of its culpability in causing the 1977 blackout by reason of the verdict in *Food Pageant, Inc.* v. *Consolidated Edison Co.*, *supra*, were entered on June 14, 1984. In the *Koch* decision, the court of appeals rejected "Con Edison's assertion that to apply third-party issue preclusion

would be to deprive it of the due process to which it is constitutionally entitled." 62 N.Y.2d at 558.

On August 23, 1984, the Court (*per* Marshall, J.) granted Con Edison an extension of time to file this petition due to the pendency of Con Edison's motion for reargument of the decision of the court of appeals that the issue of whether Con Edison is liable for the damages caused by looters and rioters during the blackout is a jury question, which motion has since been denied. This petition is timely filed under the Court's order of August 23, 1984.

The Court's jurisdiction is invoked under 28 U.S.C. § 1257(3) (1982). The finality of the orders of the court of appeals for purposes of § 1257(3) is discussed under Point II within.

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the U.S. Constitution provides in pertinent part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

At approximately 9:35 p.m. on July 13, 1977, Con Edison's entire electric power system, serving some three million customers in New York City and Westchester County, was blacked out following upon two unprecedented double circuit outages in the high tension lines bringing power down the Hudson Valley that were caused by two separate lightning strokes. Over 550 actions were instituted against Con Edison as a result of this occurrence. More than 300 of these actions are still pending, claiming aggregate damages against Con Edison in excess of $130,000,000.

Con Edison's filed tariff provides that it "will endeavor at all times to provide a regular and uninterrupted supply of service" but that it will not be liable for a service interruption resulting from "causes beyond its control or . . . ordinary negligence of employees, servants, or agents." The issue before any trier of fact is whether the blackout resulted from causes beyond Con Edison's control or negligence of its employees and, if the latter, the degree of that negligence.

The Adverse Jury Verdict

In *Food Pageant, Inc.* v. *Consolidated Edison Co.*, *supra*, the court of appeals affirmed the judgment entered upon the jury verdict that found Con Edison culpable under its tariff. The verdict awarded the plaintiff $40,500 upon claimed damages of $81,000. The court held that it would "not now disturb the jury's determination, made on the basis of the evidence before it, that [Con Edison]'s gross negligence led to the damages sustained . . . ." 54 N.Y.2d at 175.

Con Edison was prevented from placing before the *Food Pageant* jury evidence of exculpatory circumstances tending to show that the blackout resulted from causes beyond Con Edison's control. Upon his opening to the *Food Pageant* jury, Con Edison's trial counsel was foreclosed from establishing that "[t]here are certain substantial physical, political and financial restraints which influence the system reliability of Con Edison; and that these restraints included the failure of the City of New York to allow Con Edison to build plants in the City." Trial Transcript at pp. 34-36.[1]

The Judicial Findings in Con Edison's Favor

Before and since the adverse jury verdict in *Food Pageant*, judges have found that Con Edison's conduct did not constitute gross negligence but rather ordinary negligence or an error

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1 Record on Appeal, *Food Pageant, Inc.* v. *Consolidated Edison Co.*, 54 N.Y.2d 167 (1981).

in judgment. Most of these judicial findings were based upon analysis of detailed reports of official investigations of the blackout, which also describe the exculpatory circumstances that Con Edison was foreclosed from placing before the jury in *Food Pageant*.

Three separate reports on the blackout were the basis of the findings of ordinary negligence made in *Lee* v. *Consolidated Edison Co.*, 95 Misc. 2d 120, 123, 125 (N.Y.C. Civ. Ct. N.Y. Co.), *rev'd on other grounds*, 98 Misc. 2d 304 (Sup. Ct. App. T. 1st Dep't 1978) (*per curiam*). The court took judicial notice of the Norman M. Clapp, *State of New York Investigation of the New York City Blackout July 13, 1977* (January 1978) ("*Clapp Report*"), and the Staff Task Force, Department of Public Service, *Second Report: The Events Leading to the Consolidated Edison Company Blackout of July 13, 1977* (September 15, 1977), and admitted into evidence the Consolidated Edison Co. of New York, Inc., *Third Phase Report, System Blackout and System Restoration, July 13-14, 1977* (December 28, 1977). The court detailed "instances of negligence" shown by the reports (95 Misc. 2d at 125-26), but also found that "[a] review of the blackout reports also fails to provide a basis for a finding of gross negligence . . . ." 125 Misc. 2d at 128.

Following *Lee*, Con Edison was again found not to have been grossly negligent in connection with the 1977 blackout in *Lo Vico* v. *Consolidated Edison Co.*, 99 Misc. 2d 897, 898 (Sup. Ct. App. T. 2d Dep't 1979) (*mem.*). The *Clapp Report*, which was part of the record in *Lee*, *supra*, was also part of the record in *Lo Vico*, *supra*, in which the Appellate Term, Second Department, found that "the record . . . does not establish any conduct constituting gross negligence." The Appellate Term, Second Department, also exonerated Con Edison in *Finkelstein* v. *Consolidated Edison Co.*, N.Y.L.J., May 1, 1979, p. 13, col. 3 (Sup. Ct. App. T. 2d Dep't 1979), expressly relying upon its finding on the more fully developed factual record in *Lo Vico*.

After the *Food Pageant* trial, Con Edison successfully defended two additional blackout actions. In *Lehman* v. *Consolidated Edison Co.*, N.Y.L.J., March 25, 1980, p. 10, col. 6 (Sup. Ct. App. T. 2d Dep't 1980), another "consolidated appeal involv[ing] several actions to recover damages arising from the New York City blackout," the court reversed a judgment against Con Edison, finding:

> "The record before this court does not establish any conduct constituting gross negligence . . . . The report by Norman M. Clapp entitled 'State of New York Investigation of New York City Blackout July 13, 1977' which was relied upon by the trial court, at best, merely established an error in judgment on the part of Consolidated Edison." *Id.* at pp. 10-11.

In *Penichet* v. *Consolidated Edison Co.*, N.Y.L.J., May 1, 1980, p. 7, col. 2 (Sup. Ct. App. T. 1st Dep't 1980), the Appellate Term, First Department, relying upon its prior decision in *Lee*, affirmed the dismissal of an action for failure to establish Con Edison's gross negligence.

In its decision in *Koch*, the Court of Appeals summarily rejected *Lee* and the other judicial findings in Con Edison's favor because by New York statute they are not entitled to *res judicata* or collateral estoppel effect (N.Y.C. Civil Court Act § 1808) (McKinney 1963). The limit placed by the statute upon the effect of such decisions beyond the cases in which they are rendered does not, however, change the fact that judges made findings contrary to that of the *Food Pageant* jury and did so on the basis of an adequate factual record, *i.e.*, detailed reports of investigations of the causes of the blackout.

The Federal Question

In each case and in each court below, Con Edison contended that the application of offensive collateral estoppel would violate the due process guaranty of the Fourteenth Amendment

to the United States Constitution, as well as that of the New York State Constitution.[2]

REASONS FOR GRANTING THE WRIT

I. An Important and Unresolved Constitutional Question Concerning the Permissible Use of Offensive Collateral Estoppel Is Presented

> *There seems to be something fundamentally offensive about depriving a party of the opportunity to litigate the issue again when he has shown beyond a doubt that on another day he prevailed. State Farm Fire & Casualty Co.* v. *Century Home Components, Inc.*, 275 Or. 97, 110, 550 P.2d 1185, 1191 (1976).

In *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 330 (1979), the Court stated that "[a]llowing offensive collateral estoppel

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2 *See*, in *Koch*, Memorandum of Law in Support of Defendant's Cross-Motion for Partial Summary Judgment and in Opposition to Plaintiffs' Motion for Partial Summary Judgment, dated January 15, 1982, at pp. 94-97, submitted to the New York Supreme Court, New York County; in *Goldstein*, Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment, dated January 27, 1982, at pp. 49-52, submitted to the New York Supreme Court, Bronx County; and in *Gillman*, Memorandum of Law in Support of Defendant's Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Partial Summary Judgment, dated April 12, 1982, at pp. 61-64, submitted to the New York Supreme Court, New York County.

See also, Con Edison's briefs to the Appellate Division of the New York Supreme Court for the First Judicial Department: in *Koch*, Brief of Defendant-Appellant, dated March 17, 1983, at pp. 59-60; in *Goldstein*, Brief of Defendant-Respondent Consolidated Edison Company of New York, Inc., dated December 15, 1982, at pp. 59-61; and in *Gillman*, Brief of Defendant-Appellant, November 11, 1982, at pp. 68-70.

See also, Con Edison's consolidated brief to the New York Court of Appeals in the three cases: Brief of Defendant-Appellant, dated December 9, 1983, at pp. 33-34.

may . . . be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant" (footnote omitted). Such unfairness brings into play the general proposition, also stated in *Parklane*, that where "the application of offensive estoppel would be unfair to defendant, a trial judge should not allow the use of offensive collateral estoppel." 439 U.S. at 331.

The *Parklane* decision has been widely followed by the state courts,[3] but was not cited by the court of appeals here. *Parklane* did not, however, address the constitutional limitations upon the use of offensive collateral estoppel except perhaps implicitly by the quoted references to situations "unfair" to the defendant.

"Fairness" is at the heart of the administration of justice—it is the essence of due process. Unless, however, its constitutional significance is made explicit, "fairness" may, as here, be reduced to a precatory word. The Court has the constitutional responsibility, whether upon review of a state or federal decision, to delimit the use of offensive collateral estoppel so that a defendant will not be deprived of due process.

The court of appeals simply sidestepped the due process issue when it said that "Con Edison cites no authority, and we know of none, which now regards the application of third-party issue preclusion as posing a question of constitutional

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3 *See, e.g., Chrysler Corp.* v. *New Castle County*, 464 A.D.2d 75, 81 (Del. Super. Ct. 1983); *In re Estate of Leno*, 139 Vt. 554, 558, 433 A.2d 260, 263 (1981); *Cutter* v. *Town of Durham*, 120 N.H. 110, 411 A.D.2d 1120 (1980); *Little* v. *Pizza Wagon, Inc.*, 432 So. 2d 1269, 1273-74 (Ala. 1983) (*per curiam*); *Sandoval* v. *Superior Court*, 140 Cal. App. 3d 932, 942-44, 190 Cal. Rptr. 29, 35-37 (1983); *Tar Landing Villas Owners' Ass'n* v. *Town of Atlantic Beach*, 64 N.C. App. 239, 307 S.E.2d 181, 185 (1983); *Bonniwell* v. *Beech Aircraft Corp.*, 633 S.W.2d 553, 559 (Tex. App. 1982), *aff'd in part and rev'd in part*, 663 S.W.2d 816 (Tex. 1984); *Conley* v. *Spillers*, 301 S.E.2d 216, 221 (W. Va. 1983); *McIntyre* v. *ILB Investment Corp.*, 172 N.J. Super. 415, 421-24, 412 A.2d 810, 814-15 (Law Div. 1979).

dimension where in the prior action a full and fair opportunity to litigate has been afforded." 62 N.Y.2d at 558. Of course, "collateral estoppel can only be applied against parties who have had a prior ' "full and fair" opportunity to litigate their claims' " because "[t]he right to a full and fair opportunity to litigate an issue is, of course, protected by the due process clause of the United States Constitution." *Hardy* v. *Johns-Manville Sales Corp.*, 681 F.2d 334, 338 (5th Cir. 1982), *citing Parklane Hosiery* v. *Shore*, *supra*, 439 U.S. at 332; *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 329 (1971); and *Hansberry* v. *Lee*, 311 U.S. 32 (1940).

The "full and fair opportunity" requirement is misleading, however, if it is understood to mean that issue preclusion follows automatically when the losing defendant had the opportunity to litigate an issue. That interpretation, which focuses only upon the "fairness" of the case in which the party lost, would sanction offensive collateral estoppel in precisely such a "fundamentally offensive" situation as is present here.

The doctrine of offensive collateral estoppel is "fraught with drumhead potential." *Jack Faucett Associates, Inc.* v. *American Telephone & Telegraph Co.*, 1984-2 Trade Cas. (CCH) ¶ 66,186 at 66,684 (D.C. Cir. 1984). As Justice Sandler, dissenting in *Goldstein*, said, "[t]he obvious practical advantages inherent" in the majority's decision "seem to me far outweighed by the palpable unfairness of the result reached." 93 A.D.2d at 604, 63a.

The "full and fair opportunity" requirement is really, Con Edison submits, that it be fair in *all* the circumstances to preclude relitigation of the issue in the later action. If that is not the test, civil litigation will be governed by pragmatic considerations akin in their different context to those thought to justify drumhead court martials.

In other contexts, the Court has consistently held that the constitutional guaranty of due process means, at the very least, that a litigant shall be accorded fundamental fairness. *E.g.*,

Hobby v. *United States*, 104 S. Ct. 3093, 3097 (1984); *Little* v. *Streater*, 452 U.S. 1, 16 (1981). Because the "full and fair opportunity" test for offensive use of collateral estoppel as applied by the New York Court of Appeals here does not insure a fundamentally fair result, the Court should define the requirement of fundamental fairness as a constitutional limitation on the offensive use of collateral estoppel.

II. The Orders of the New York Court of Appeals Are Final For Purposes of 28 U.S.C. § 1257(3)

The orders of the New York Court of Appeals in *Koch*, *Goldstein* and *Gillman* decided once and for all so far as the courts of New York are concerned that Con Edison is precluded from litigating its culpability for the blackout and that such preclusion does not deprive it of the due process guaranteed it by the Fourteenth Amendment.

Although in these three actions and in the other actions pending against Con Edison, state law issues of customer status, causation, comparative fault and the fact and amount of damage may remain, it is simply not possible, actionable culpability having been established, that in every action such state law issues will be resolved in Con Edison's favor so as to moot the constitutional issue common to all the actions. *See Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 478 (1975).

The finality requirement is to be given a "practical" and "pragmatic" construction. *See, e.g., Cox Broadcasting Corp.* v. *Cohn*, *supra*, 420 U.S. at 486; *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152 (1964). The highest court of New York has finally decided the constitutional issue. That decision is final for purpose of review under 28 U.S.C. § 1257(3).

CONCLUSION

The writ of certiorari should issue.

Dated: New York, New York
November 9, 1984

Respectfully submitted,

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Opinion and Order of the Court of Appeals of the State of New York in *Koch*

Edward I. Koch, as Mayor of the City of New York, et al., *Respondents-Appellants* v. Consolidated Edison Company of New York, Inc., *Appellant-Respondent*.

Argued May 2, 1984; decided June 14, 1984

OPINION OF THE COURT

JONES, J.

The determination made in a prior action that Con Edison was grossly negligent in connection with the 1977 blackout in the City of New York is binding and conclusive on Con Edison in this action. Although plaintiffs may recover damages for physical injury to persons and property directly resulting from the service interruption, including damages resulting from looting and vandalism by rioters, they may not recover damages for additional expenditures, occasioned by the blackout, made by plaintiffs in the performance of their governmental functions, nor may they recover for loss of revenues assertedly attributable to the blackout.

On July 13, 1977 at approximately 9:36 P.M. there was a complete failure of electrical service in the City of New York except for an area in the Borough of Queens which was supplied by the Long Island Lighting Company. The blackout lasted for approximately 25 hours with power not being completely restored until approximately 10:40 P.M. on July 14.

The present action was instituted on September 7, 1978 by the City of New York and 14 public benefit corporations to recover damaged allegedly sustained as a result of Con Edison's gross negligence and reckless and willfull conduct with respect to the blackout.

Plaintiffs moved for partial summary judgment with respect to Con Edison's liability for gross negligence "on the ground that, under the doctrine of collateral estoppel, a prior deter-

mination in another lawsuit (*Food Pageant, Inc.* v. *Consolidated Edison Co., Inc.*, Supreme Court, Bronx County, Index No. 16971/77)[1] that the July 13-14, 1977 electric power failure * * * resulted from the gross neglience of the defendant Consolidated Edison, is conclusive and binding on the defendant Consolidated Edison in this action". Con Edison thereupon made a cross motion for partial summary judgment, so far as pertinent for the purposes of the present appeal, (1) dismissing plaintiffs' claims based on Con Edison's contracts with the Power Authority of the State of New York (PASNY) because "plaintiffs are neither parties nor third-party beneficiaries of those contracts", (2) dismissing "plaintiffs' claims for damages attributable to criminal activity, civil disturbances, municipal employee absenteeism and lost productivity" because "superseding causes preclude imposition of liability upon Con Edison for such damages", and (3) dismissing "plaintiffs' claims for reimbursement of municipal expenditures incurred during July 13-14, 1977" because "plaintiffs cannot recover as damages the costs of governmental operations which they were created to perform".

Special Term granted plaintiffs' motion and denied Con Edison's motion as described above. The Appellate Division affirmed, without opinion, and granted both plaintiffs and Con Edison leave to appeal to our court. We modify the determination at the Appellate Division.

We agree with both courts below that on the issue of Con Edison's liability for gross negligence in connection with the blackout, Con Edison is precluded by the adverse determination of the issue in *Food Pageant v Consolidated Edison Co.* (54 NY2d 167). The applicable principle in this case is that of third-party issue preclusion.[2]

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1 When this case reached our court we upheld the jury verdict which found Con Edison to have been grossly negligent in causing the 1977 blackout and which awarded plaintiff grocery store chain damages in the sum of $40,500 for food spoilage and loss of business. (*Food Pageant v Consolidated Edison Co.*, 54 NY2d 167).

2 Issue preclusion between the same parties is to be distinguished from third-party issue preclusion. In the former case as stated in section 27 of the

It is plaintiffs who seek to invoke the principle of third-party issue preclusion to bar Con Edison from relitigating its liability for gross neglience. It is not disputed that this issue was actually litigated and determined by a valid and final judgment in *Food Pageant* and that the determination of that issue was essential to the judgment in that case. Plaintiffs contend, therefore, that the determination in *Food Pageant* is binding and conclusive in this case. Con Edison, having the burden[3] to demonstrate that the circumstances of the prior determination justify affording it an opportunity to relitigate the issue of liability, advances several arguments in support of its contention that the determination in *Food Pageant* is not to be given preclusive effect.[4] These arguments, taken singularly or in

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Restatement of Judgments, Second—"When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgement, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim", subject to a very narrow range of exceptions (*id.*, § 28). By some contrast the principle of third-party issue preclusion is that, again in the phraseology of the Restatement (§ 29)—"A party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person". The range of circumstances which may lead to avoidance of preclusion, however, is now much broader—"unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances jusitfy affording him an opportunity to relitigate the issue." With respect to the distinction between issue preclusion between the same parties and third-party issue preclusion, see *Matter of American Ins. Co.* (*Messinger—Aetna Cas. & Sur. Co.*) (43 NY2d 184, 190).

3 (*Schwartz v Public Administrator*, 24 NY2d 65, 73.)

4 The relevant factors to be considered are set out in section 29 of the Restatement of Judgments, Second, and in *Schwartz*. Section 29 provides in full as follows:

> "§ 29. Issue Preclusion in Subsequent Litigation with Others
>
> "A party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue. The circumstances

combination, do not warrant the result for which Con Edison contends, and Con Edison has not tendered sufficient proof in admissible form to require trial of any issue of fact or reversal of the exercise of judgment by the courts below.

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to which considerations should be given include those enumerated in § 28 and also whether:

"(1) Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;

"(2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined;

"(3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;

"(4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;

"(5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;

"(6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;

"(7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which is was based;

"(8) Other compelling circumstances make it appropriate that the party be permitted to relitigate the issue."

The articulation in *Schwartz* appears at page 72, as follows: "A decision whether or not the plaintiff drivers had a full and fair opportunity to establish their nonnegligence in the prior action requires an exploration of the various elements which make up the realities of litigation. A comprehensive list of the various factors which should enter into a determination whether a party has had his day in court would include such considerations as the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law and foreseeability of future litigation."

It is first contended that third-party issue preclusion should not apply because there are other judicial determinations concluding that Con Edison was not guilty of gross negligence in connection with the blackout.[5] Whatever might be said of the effect properly to be given to inconsistent determinations of like judicial stature, in this instance it suffices to dismiss Con Edison's contention to observe that the inconsistent determinations on which it would rely are those in cases tried in Small Claims Part of the Civil Court of New York City as to which informal and simplified procedures are applicable[6] and which by express statutory provision are not to be deemed an adjudication of any fact at issue (other that the amount involved) with respect to any other action.[7]

Con Edison next argues that there is now available exculpatory evidence which in fairness requires that it be permitted to relitigate the issue of liability. Reference is made to investigative reports, in particular to the so-called Clapp Report. These

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5 (*Penichet v Consolidated Edison Co.*, NYLJ, May 1, 1980, p 7, col 2; *Lehman v Consolidated Edison Co.*, NYLJ, March 25, 1980, p 10, col 6; *Finkelstein v Consolidated Edison Co.*, NYLJ, May 1, 1979, p 13, col 3; *LoVico v Consolidated Edison Co.*, 99 Misc 2d 897; *Lee v Consolidated Edison Co.*, 95 Misc 2d 120.)

6 CCA 1804 provides: "The court shall conduct hearings upon small claims in such manner as to do substantial justice between the parties according to the rules of substantive law and shall not be bound by statutory provisions or rules of practice, procedure, pleading or evidence, except statutory provisions relating to privileged communications and personal transactions or communications with a decedent or mentally ill person. Disclosure shall be unavailable in small claims procedure except upon order of the court on showing of proper circumstances. The provisions of this act and the rules of this court, together with the statutes and rules governing supreme court practice, shall apply to claims brought under this article so far as the same can be made applicable and are not in conflict with the provisions of this article; in case of conflict, the provisions of this article shall control."

7 CCA 1808 provides: "A judgment obtained under this article may be pleaded as res judicata only as to the amount involved in the particular action and shall not otherwise be deemed an adjudication of any fact at issue or found therein in any other action or court."

reports were available and offered but rejected in the *Food Pageant* trial. Nothing suggests that the exclusion of this hearsay evidence was their error (and any contention that it was could have been subjected to appellate review on the appeal in that case), and no persuasive argument is now advanced to support admissibility in this case.

Con Edison next makes an oblique plea that we should reintroduce the former requirement of mutuality which we declared "a dead letter" in *B.R. DeWitt, Inc. v. Hall* (19 NY2d 141, 147). To grant this plea would, of course, be entirely to eliminate third-party issue preclusion. It is understandable that Con Edison should express concern, in the light of the multiplicity of claims arising out of the blackout, that the issue of its gross negligence will have been established in each case. Nevertheless, no sufficient justification is advanced to turn the clock back with respect to so fundamental a legal development as the elimination of the requirement of mutuality. We have been committed since *DeWitt*, and indeed even before (*Israel v Wood Dolson Co.*, 1 NY2d 116), to the proposition that efficient utilization of the judicial system is served by preclusion of relitigation of issues as to which a litigant has had a full and fair opportunity for resolution, irrespective of the identity of his particular opponent. Nor does Con Edison advance any intermediate position warranting a different application of the principles of third-party issue preclusion with respect to a multiplicity of claims arising out of a community-wide disaster such as the blackout in this case.

It is then argued that the determination in *Food Pageant* should not be given preclusive effect because of indications that it was the result of compromise in the jury room. No tender has been made, however, of proof in admissible form sufficient to require trial of this factual issue. The arguments of Con Edison are grounded only in speculation, and it cannot be said as a matter of law that the *Food Pageant* verdict was the result of impermissible compromise.

The circumstance, to which Con Edison next points, that the claim in *Food Pageant* and the amount of the jury's verdict ($40,500) may be said to be "small in absolute terms and

particularly so when compared to the aggregate of over $200 million in claims against Con Edison arising out of the 1977 blackout", provides no basis to deny application of third-party issue preclusion. In *Food Pageant*, Con Edison had a full and fair opportunity to litigate the issue of gross negligence, the forum and applicable procedures were the same, the burden of persuasion was the same, and Con Edison, explicitly then recognizing the potential preclusive effects of an adverse determination in that case, had every incentive to defend that action fully and vigorously.

Nor does the adoption of a rule of comparative negligence in New York (CPLR art 14-A) foreclose application of third-party issue preclusion in the circumstances of this case. No contention whatsoever is put forth by Con Edison that any action or omission to act on the part of any of plaintiffs contributed to cause the blackout. There simply is no issue of comparative negligence involved in the question of Con Edison's responsibility for the blackout. It may be, however, that principles of mitigation will require consideration of certain action or inaction on the part of plaintiffs in the determination of damages.

Finally, with respect to the preclusion issue, we reject as wholly without merit Con Edison's assertion that to apply third-party issue preclusion would be to deprive it of the due process to which it is constitutionally entitled. The characterization of this appeal as "presenting a question of fundamental fairness" neither concludes nor advances the argument. Con Edison cites no authority, and we know of none, which now regards the application of third-party issue preclusion as posing a question of constitutional dimension where in the prior action a full and fair opportunity to litigate has been afforded.

For the reasons stated we conclude that the prior determination in *Food Pageant* with respect to Con Edison's liability for gross negligence in connection with the 1977 blackout is binding and conclusive on Con Edison in this action.

We reject, too, Con Edison's argument that because the city and the other plaintiffs associated with it were customers of PASNY and not direct customers of Con Edison, they are not entitled to recover against Con Edison. In 1974 a new section,

"§1001-a. Emergency Provisions For The Metropolitan Area of the City of New York", was added to the Public Authorities Law (L 1974, ch 369, § 2). Pursuant to the authorization of that section, in December, 1974 and December, 1975 PASNY acquired from Con Edison two partially completed generating units (the Astoria 6 and the Indian Point 3 Units). The underlying legislation and both acquisitions anticipated that Con Edison would continue to provide transmission and delivery of the electricity produced in the two plants. In conformity with that expectation, a service agreement was entered into by PASNY and Con Edison for delivery of power and energy from the Astoria 6 Unit and the Indian Point 3 Unit, in which was recited Con Edison's willingness, by use of its existing facilities, to assist PASNY in serving the needs of the Astoria-Indian Point customers, and Con Edison became obligated to provide the same quality of service to PASNY's customers as it did to its own customers and under Con Edison's regular tariff schedules. In a simultaneously executed "Contract for the Sale of Power and Energy", Con Edison agreed to provide sufficient energy to meet the requirements of PASNY's affected customers.

Against this background we have no difficulty in concluding that all the plaintiffs were third-party beneficiaries of the agreements between PASNY and Con Edison. They were precisely the consumers for whose benefit the legislation was enacted and the agreements made between PASNY and Con Edison.

To be distinguished are our holdings in *Moch Co. v Rensselaer Water Co.* (247 NY 160 [contract between water company and city to supply water for fire hydrants did not create a duty to member of the public]) and *Kornblut v Chevron Oil Co.* (62 AD2d 831, affd on opn below 48 NY2d 853 [contract with Thruway Authority to provide repair services did not create duty to members of the public]). In neither of those cases did the operative contract provide that the service was to be rendered other than for the contracting party, city or authority. Moreover, in *Moch* we noted the distinction between the

agreement of the water company, there in issue, to furnish water at the hydrants and the agreement of the water company to provide direct service to members of the public at their homes and factories (247 NY, pp 164, 166). In the present instance, the purpose of the enabling legislation was expressly stated to be "To preserve reliability of electric service in the metropolitan area of the city of New York" (Public Authorities Law, § 1001-a, subd 1), and the service agreement contained the express obligation to "operate and maintain all the facilities necessary to deliver power to Astoria-Indian Point Customers [which included plaintiffs] in accordance with good utility operating practice". Indeed, the essence of the responsibility of a public utility is to provide services to the consuming public.

We turn then to issues posed by Con Edison's motion for partial summary judgment with respect to the extent of the damages to which plaintiffs may be entitled, on appropriate supporting proof, observing that plaintiffs' action sounds both in contract and in tort. Initially we note that procedurally Con Edison may raise challenges in this regard by a motion for partial summary judgment seeking dismissal of claims for specified and distinct categories of damages (CPLR 3212, subd [e]; see Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:30, p 448).

It is not disputed that plaintiffs would be entitled, on supporting proof, to recover damages for physical injury to persons and property directly resulting from the service interruption. Con Edison disputes their right, however, to recover damages resulting from looting and vandalism by rioters related to the blackout. We reject this contention inasmuch as plaintiffs have shown facts sufficient to require a trial of the factual question of whether intervention of the rioters was within the contemplation of the parties or reasonably to have been foreseen by Con Edison. If so, a jury could, under appropriate instructions, properly include this element of damage in any award to plaintiffs (cf. *Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507).

We rule in favor of Con Edison, however, as to two other categories of damage. Con Edison argues persuasively that plaintiffs should not be permitted to recover costs incurred for wages, salaries, overtime and other benefits of police, fire, sanitation and hospital personnel from whom services (in addition to those which would normally have been rendered) were required in consequence of the blackout. The general rule is that public expenditures made in the performance of governmental functions are not recoverable (see, generally, *Matter of TMI Litigation Governmental Entities Claims,* 544 Supp 853, 855, mod *sub nom. Pennsylvania v General Public Utilities Corp.,* 710 F2d 117 [caused by nuclear incident]; *City of Bridgeton v B.P. Oil,* 146 NJ Super 169, 178-179 [caused by oil spill]; *Town of Freetown v New Bedford Wholesale Tire,* ____ Mass ____, 423 NE2d 997 [caused by dumping of large quantity of tires]).[8] The general rule is grounded in considerations of public policy, and we perceive nothing in the different and somewhat closer relationship between Con Edison and plaintiffs in this case which would warrant departure from that rule. We additionally note that certain exceptions to the general rule have been created by statutory enactment to give a municipality a claim for expenditures for fire fighting and other police power services. (See, e.g., General Municipal Law, § 207-c [municipality given a cause of action for reimbursement against third-party tort-feasor for any sums paid to injured policemen as salary and medical expenses]; *id.,* § 209 [local fire department given claim for reimbursement for fire fighting costs against municipality which issued call for outside assistance]; *id.,* § 209-g [municipality providing fire or police aid pursuant to § 209-e or § 209-f given claim against municipality requesting such aid]; State Finance Law, § 54-e [municipality whose fire department has responded to a fire on property under jurisdiction of New York State given right to submit claim for State reimbursement of fire fighting costs]). No

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8 For discussion of recovery of damages by nongovernmental plaintiffs, see *Dunlop Tire & Rubber Corp. v FMC Corp.* (53 AD2d 150).

statute is called to our attention which would accord a comparable benefit to plaintiffs in the circumstances of this case.

Finally, and we think effectively, Con Edison disputes the right of plaintiffs to recover revenues allegedly lost in consequence of the blackout—taxes not recovered on sales, transfers, and business transactions not undertaken, transit fares and tolls not paid, and receipts from wagers not placed with the Off-Track Betting Corporation. In the same category is to be included loss of productivity of employees due to absenteeism. The tender of proof of damages in this category is speculative only, determinable solely by reference to collateral transactions (or their absence), and insufficient to defeat Con Edison's motion. (Cf. *Burns Jackson Miller Summit & Spitzer v Lindner,* 59 NY2d 314, 334-335). Additionally, there are strong considerations of public policy which militate against recognition of losses sustained by municipal and public benefit corporations in consequence of adverse effects on the general economy. That there will inevitably be interruptions in utility services from time to time must be taken for granted. Loss of revenues by municipal and public benefit corporations in consequence of the interruption of utility services, however, is the economic counterpart of the incurment of added costs attributable to such interruption (see *supra,* pp 560-561). In neither case will recovery be allowed.[9]

For the reasons stated, the order of the Appellate Division should be modified, without costs, to grant Con Edison's motion for partial summary judgment dismissing plaintiffs' claims for damages on account of expenditures made for additional governmental services furnished in consequence of the blackout and for loss of revenue and similar economic

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9 In private litigation, recovery of damages for loss of profits generally depends on the certainty and specificity of the proof (see *Dunlop Tire & Rubber Corp. v FMC Corp.*, 53 AD2d 150, 154-156). Thus, in *Food Pageant* (54 NY2d 167) a private litigant was awarded such damages. In that case, it is to be observed, Con Edison registered no protest to the charge that damages could be awarded for loss of profits, and in our court did not challenge the sufficiency of the evidence to support such an award.

damage asserted to be attributable to the blackout, and as so modified, affirmed.[10]

Chief Judge COOKE and Judges JASEN, WACHTLER, MEYER, SIMONS and KAYE concur.

Order modified, without costs, in accordance with the opinion herein and, as so modified, affirmed. Cross appeal by plaintiffs dismissed, without costs. Question certified answered in the negative.

10 The cross appeal taken by plaintiffs should be dismissed on the ground that it does not lie inasmuch as they took no appeal to the Appellate Division.

Opinion and Order of the Court of Appeals of the State of New York in *Goldstein* and *Gillman*

MORRIS GOLDSTEIN et al.,

Respondents,

—v.—

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., Appellant, et al.,

Defendants.

SEYMOUR GILLMAN, as Trustee in Bankruptcy for SHERRY TOBACCO COMPANY, INC., and CLAREMONT-MADISON TOBACCO CORP.,

Respondent,

—v.—

CONSOLIDATED EDISON COMPANY OF NEW YORK,

Appellant.

Argued May 2, 1984; decided June 14, 1984

OPINION OF THE COURT

Orders affirmed, with costs, and question, certified answered in the affirmative (see *Koch v Consolidated Edison Co.*, 62 NY2d 548).

Concur: Chief Judge COOKE and Judges JASEN, JONES, WACHTLER, MEYER, SIMONS and KAYE.

Opinion of the New York Supreme Court Granting Partial Summary Judgment in *Koch*

SUPREME COURT, NEW YORK COUNTY

SPECIAL TERM, PART I

Index No. 42091/78

Cal. No. 78 of 3/24/82

EDWARD I. KOCH, as Mayor of the City of New York, THE CITY OF NEW YORK, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, NEW YORK CITY OFF-TRACK BETTING CORPORATION, BOARD OF EDUCATION OF THE CITY OF NEW YORK, BOARD OF HIGHER EDUCATION, CITY UNIVERSITY OF NEW YORK, NEW YORK CITY HOUSING AUTHORITY, TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, STATEN ISLAND RAPID TRANSIT OPERATING AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, THE LONG ISLAND RAILROAD COMPANY, METROPOLITAN SUBURBAN BUS AUTHORITY and CONSOLIDATED RAIL CORPORATION,

Plaintiffs,

—against—

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendant.

Opinion of the New York Supreme Court Granting Partial Summary Judgment in Koch

DONTZIN, *J.*:

Plaintiffs move for partial summary judgment declaring Consolidated Edison Company of New York [Con Ed] liable and seek an immediate trial to determine the amount and extent of the damages. Con Ed cross moves for partial summary judgment dismissing all but three counts of the amended complaint (counts 31, 57A and 67B, involving areas and customers directly served by Con Ed) and seeks to amend its answer to add certain affirmative defenses.

On July 13th, 1977 at approximately 9:36 p.m. there was a complete failure of electrical service in the City of New York except for an area in Queens which is supplied by the Long Island Lighting Company. The blackout lasted for approximately 25 hours with power not being completely restored until approximately 10:40 p.m. on July 14th, 1977. This action was commenced on September 7, 1978 by The City of New York [City] and fourteen (14) Public Benefit Corporations, to recover the damages allegedly sustained as a result of Con Ed's gross negligence with respect to the blackout. While the complaint, as amended, advances several grounds for recovery, in substance the claim is that the complete failure of electrical service in New York City was a direct result of Con Ed's gross negligence, reckless and wilful conduct.

The City seeks $60 million in compensatory damage and $50 million in punitive damages. The Public Benefit Corporations seek damages as follows: $883,000 for the Health and Hospital Corporation; $522,203 for the Off-Track Betting Corporation; $242,364.12 for the Board of Higher Education; $1,154,785 for The Board of Education; $987,148 for The Housing Authority; $218,486 for The Triborough Bridge and Tunnel Authority; $617,000 for The Metropolitan Transportation Authority; $6,905.06 for The Staten Island Rapid Transit Operating Authority; $70,796.30 for Manhattan and Bronx Surface Transit Operating Authority; $7,891,370.56 for The New York City Transit Authority; $5,461 for The Metropolitan Suburban Bus Authority and $519,000 for the Long Island Railroad Company.

Opinion of the New York Supreme Court Granting Partial Summary Judgment in Koch

Plaintiffs in this proceeding seek a declaration that under the doctrine of collateral estoppel, Con Ed was grossly negligent, relying on the case of *Food Pageant, Inc.* v. *Consolidated Edison Co.* (Supreme Court, Bronx County; aff'd 78 AD2d 1016; aff'd 54 NY2d 167).

In *Food Pageant*, a jury in rendering a verdict in favor of plaintiff for damages it sustained during the 1977 blackout found that Con Ed was grossly negligent in bringing about the blackout.

Collateral Estoppel

The Plaintiffs' motion for partial summary judgment is predicated on the doctrine of collateral estoppel.

The doctrine of collateral estoppel is "designed to bar relitigation of adjudicated issues" and is "the law's recognition of the fact that it is to the interest of the State that there be an end to litigation." *Israel* v. *Wood Dolson Co.*, 1 N.Y. 2d 116, 118, (1956). It is grounded upon "the sound principle that, where it can be fairly said that a party has had a full opportunity to litigate a particular issue, he cannot reasonably demand a second one." *Schwartz* v. *Public Administrator*, 24 N.Y. 2d 65, 69 (1969).

Further, the doctrine may be invoked by a person who was not a party to the prior action—for "offensive" as well as "defensive" purposes—if the requirements of identity of issue and full and fair opportunity to contest have been satisfied. See, e.g., *B.R. DeWitt, Inc.* v. *Hall*, 19 N.Y. 2d 141 (1967); *Guarino* v. *Mine Safety Appliances Co.*, 31 A.D. 2d 255, 259, (2d Dept), *aff'd on other grounds*, 25 N.Y. 2d 460 (1969); *Hart* v. *American Airlines, Inc.*, 61 Misc. 2d 41 (Sup. Ct. 1969).

In allocating the burden of proof with respect to the two requirements for invoking the doctrine, the burden of establishing the first requirement—identity of issue—is on the moving party. However, as to the second requirement, "the burden rests on the defendant to show that collateral estoppel should not be applied because he did not have a full and fair opportunity." *Schwartz* v. *Public Administrator, supra*, 24 N.Y.2 at 73.

Opinion of the New York Supreme Court Granting Partial Summary Judgment in Koch

It is the Court's opinion that the requirements for the invocation of the doctrine of collateral estoppel have been satisfied.

With respect to the first requirement, the issue of gross negligence in this action is identical to the gross negligence issue already determined in *Food Pageant, supra* where Con Ed was charged with gross negligence in causing and prolonging the July 13-14, 1977 blackout. Indeed, the only issue on liability submitted to the jury was that of Con Ed's alleged gross negligence. Here, Con Ed is likewise being charged with responsibility for the same event and one of the grounds for the recovery sought against Con Ed is gross negligence.

Con Ed had a full and fair opportunity in the *Food Pageant* case to make its defense. The transcript of the trial makes it abundantly clear that Con Ed defended that action with the utmost vigor, as does the subsequent appellate record to the Court of Appeals.

Con Ed had a strong incentive to diligently defend the *Food Pageant* action. In addition to the amount directly involved which was not insubstantial, Con Ed was fully aware of the significance of the *Food Pageant* case in terms of its potential collateral estoppel effect on other blackout lawsuits. In the affidavit that counsel for Con Ed submitted to the Appellate Division in support of Con Ed's motion for reargument or leave to appeal to the Court of Appeals, he stated:

> "This is the first Supreme Court action arising out of the blackout to go to trial. This Court's affirmance without opinion of the judgment entered upon the jury verdict is of very great consequence to Con Edison, to the stockholders of Con Edison and to the customers it serves. Over 180 actions arising out of the 1977 blackout in which damages of over $200,000,000 are sought from Con Edison are pending in the Supreme Court in the First and Second Departments. This Court's decision gives no guidance to the Justices who will preside over those actions, unless it be that the $40,500 jury verdict here is collaterally to determine once and for all Con Edison's

responsibility for the blackout." (Affidavit of William E. Hegarty, p. 2, annexed as Exhibit L to plaintiffs' moving affidavit.)

This court finds unpersuasive the argument that the verdict in *Food Pageant* was a compromise verdict. Equally uncompelling is the series of victories Con Ed obtained in Small Claims Court, over *pro-se* litigants, many of which occurred before the Court of Appeals decision in *Food Pageant*. Indeed, the New York City Civil Court Act provides (Sec. 1808) that a judgment obtained at Small Claims is not an adjudication of fact other than to the extent that it is conclusive as to the amount involved, and cannot be pleaded in any other action or court.

Since Con Edison has had its day in court with respect to the issue of gross negligence, it should not be permitted to relitigate that question again in this case. The Court notes that this holding is in accord with the most recent holdings in *Whitestone Packing Corp.* v. *Consolidated Edison*, NYLJ February 25, 1982, p. 12 col. 3, and *Scalamandre Silks Co.* v. *Consolidated Edison Co.* (Sup. Ct. NY County Index No. 4321/79). However the resolution of this issue does not resolve the broader issue of liability so as to entitle the plaintiffs to an assessment of damages. There still remains the unresolved factual issues, raised by this proceeding, as to whether, and to what extent, plaintiffs' acts and superceding [sic] events impacted on the causal connection between Con Ed's conduct and the injury and damages claimed by the plaintiffs. This will require a trial.

The Affirmative Defenses—The Amended Answer

Con Ed seeks to dismiss all but three counts of the amended complaint on the grounds that:

1—Plaintiffs' claims based on Con Ed's contracts with the Power Authority of the State of New York must be dismissed because as a matter of law plaintiffs are neither parties to nor third party beneficiaries of such contract.

2—Plaintiffs' claims based on their contracts with Con Ed must be dismissed because as a matter of law the contracts do not permit recovery of damages of the kind sought herein.

3—Plaintiffs' claims based on Con Ed's ordinary negligence fail to state a cause of action.

4—The claims of the plaintiffs who were non-customers fail to state a cause of action because as a matter of law Con Ed owes no duty to them.

5—Plaintiffs' claims for damages attributable to criminal activity, civil disturbances, municipal employee absenteeism and lost productivity must be dismissed as a matter of law because superseding causes preclude imposition of liability upon Con Ed for such damages.

6—Plaintiffs' claims for reimbursement of municipal expenditures incurred during the blackout must be dismissed because plaintiffs cannot recover as damages the costs of governmental operations which they were created to perform.

Under a July 1st, 1974 agreement entered into between Con Ed and The City of New York, Con Ed had agreed to provide to the City electrical service for its public buildings and street lighting in all five boroughs except for a portion of Queens which was supplied by the Long Island Lighting Company. [The July 1974 Agreement]

In December of 1974 and December of 1975 Con Ed entered into agreements with the Power Authority of the State of New York ["PASNY"] which in substance permitted PASNY to acquire two partially completed electrical power generating stations (Indian Point 3 and Astoria 6) from Con Ed. PASNY's acquisition of these generators was made pursuant to its statutory authority [Public Authority's Law Sec. 1001(a)]. The purpose of the acquisition was three-fold: to alleviate the shortage of electricity in the metropolitan area; to relieve Con Ed of what was viewed by the State Legislature as the impossi-

ble burden of financing the construction of new generating facilities; and to provide inexpensive power to "priority customers" in the metropolitan area. "Priority customers" were defined in the December 1975 agreement as the Metropolitan Transit Authority, The New York Transit Authority, The Port Authority, The City of New York, The State of New York, the U.S. and other public corporations within the metropolitan area of the City of New York. As a consequence of this agreement PASNY acquired the two generating facilities and became the electrical power supplier to the majority of the installations of the plaintiffs named in this action. However, Con Ed made its transmission and distribution facilities available to PASNY and administered all the metering and billing mechanisms. At the time of the blackout, some of the plaintiffs were customers of PASNY, some were customers of Con Ed, and some were customers of both.

It is the law of this state that in order for a plaintiff to succeed in an action predicated on the interruption of electrical service, it is necessary that there be a contractual relationship between the parties (*See* Beck v. FMC Corp. et al. 53 App.Div. 2d 118 aff'd 42 NY2d 1027, Kraye v. Long Island Lighting Co. 42 AD2d 972, Nicholson v. City of New York 271 App.Div. 899 aff'd 297 N.Y. 518, Shubitz v. Consolidated Edison Co. 59 Misc.2d 732), and that the plaintiff prove *gross negligence* (*See* Lee v. Consolidated Edison 98 Misc. 2d 304, Newman v. Con Edison 79 Misc. 2d 153).

Here it is clear that the majority of plaintiffs' claims arose at sites where electricity was supplied by PASNY, albeit the transmission was over lines owned and operated by Con Edison. Concededly, Con Edison owed a duty to its customers, and clearly, as to them, Con Ed was grossly negligent. The question raised on defendant's motion for partial summary judgment is what duty, if any, did Con Edison owe to those plaintiffs who were customers of PASNY? For if no duty is owed, then, and as to these claims it is this Court's opinion there is no liability.

Plaintiffs' claim that by virtue of the legislation authorizing PASNY to acquire the generating plants at Indian Point and

Astoria, and the contracts entered into between PASNY and Con Edison, the plaintiffs were third-party beneficiaries, of such contracts.

The Appellate Division, Fourth Dept. recently had the occasion to rule on a situation not dissimilar to that here. In that case (Airco Alloys v. Niagara Corp. 76 AD2d 68), the Court ruled that the plaintiffs had failed to demonstrate that they were third-party beneficiaries of a contract between Niagara Mohawk and PASNY. In that ruling the court set forth the law as follows:

> "A third party may sue as a beneficiary on a contract made for his benefit (Lawrence v. Fox, 20 NY 268). The intent to benefit a third party must be shown (Port Chester Elec. Constr. Corp. v. Atlas, 40 NY2d 652; Beveridge v. New York El. R.R. Co., 112 NY 1) and the benefit must not be merely incidental but immediate to such a degree as to indicate the assumption of a duty to make reparation if the benefit is lost (Associated Flour Haulers & Warehouseman v. Hoffman, 282 NY 173; Moch Co. v. Rensselaer Water Co., 247 NY 160). Absent such intent, the third party is merely an incidental beneficiary with no right to enforce the contract (Port Chester Elec. Constr. Corp. v. Atlas, supra; Associated Flour Haulers & Warehousemen v. Hoffman, supra; Moch Co. v. Rensselaer Water Co., supra; Flemington Nat. Bank & Trust Co. (N.A.) v. Dolmer Leasing Corp., 65 AD2d 29)."
>
> (Airco Alloys v. Niagara Corp. *supra*, p. 79)

The legislature, in enacting Chapter 369 of the Laws of 1974, specifically stated:

> "It is further declared that there is a shortage of dependable power capacity in the southeastern part of the state and that the public interest requires that the authority assist in alleviating such shortage by providing such base load generating facilities as may be necessary or desirable to contribute to the maintenance of an adequate

and dependable supply of electricity for the metropolitan transportation authority, its subisdiary corporations, the New York city transit authority, *the port authority of New York and New Jersey, the city of New York, the state of New York, the United States, other public corporations and electric companies within the metropolitan area of the city of New York within the state of New York.*

(McKinney 1974 Session Laws of New York Vol. 1 p. 505)

It then proceeded to amend § 1005 of The Public Authorities Law to authorize the authority

"to construct *and/or acquire and complete* such base load generating, *transmission and related* facilities as it deems necessary or desirable to assist in maintaining an adequate and dependable supply of electricity by supplying power and energy for the metropolitan transporation authority, its subsidiary corporations, the New York city transit authority, *the port authority of New York and New Jersey, the city of New York, the state of New York, the United States, other public corporations and electric corporations within the metropolitan area of the city of New York within the state of New York; provided, however, that the acquisition of completed or partially completed facilities shall be limited to facilities located in New York city or Westchester county and the energy and power generated by such facilities shall be used, to the extent feasible, for the benefit of electric consumers in that area, and provided, further, that transmission facilities shall not be so acquired pursuant to this paragraph unless such acquisition is necessary to assure delivery of power and energy produced by any acquired generating facility.*

(McKinney 1974 Session Laws of New York Vol. 1 p. 506)

The contracts between PASNY and Con Edison clearly evince an intention to benefit the plaintiffs. Indeed the preamble to the December 1974 contract states:

Opinion of the New York Supreme Court Granting Partial Summary Judgment in Koch

> "Whereas, in order to help alleviate Con Edison's financial condition, particularly its cash requirements, and to insure its ability to serve its customers in a reasonable and efficient manner the Legislature enacted Chapters 369 and 370 of the Laws of 1974 amending the Power Authority Act (§§ 100a and 1005) to enable the Authority to acquire by purchase, condemnation or appropriation and complete such base load generating, transmission and related facilities as it deems necessary or desirable to assist in maintaining an adequate and dependable supply of electricity by supplying power and energy for the Metropolitan Transportation Authority and its subsidiary corporations, the Transit Authority of the City of New York, the Port Authority of the States of New York and New Jersey, the City of New York, the State of New York, the United States of America and other public corporations within the metropolitan area of the City of New York; and . . ."

Additionally the Service Agreement contains terms that are solely for the benefit of PASNY's New York City customers (*see* Art II(d), Art. II(e) and Contract for the Sale of Power and Energy. (Defendant's Ex. 4) The court notes that the only customers were "priority customers" and those clearly included the plaintiffs' governmental entities in the metropolitan area. Under the contract, notwithstanding that the plaintiffs were not signatories, it is clear that they were within a definable class to whom the defendant Con Edison had assumed a duty (*see* White v. Guarente 43 NY2d 356, American Express Co. v. United States Lines, Inc. 76 AD2d 428). Accordingly, the motion to dismiss as to those plaintiffs who were not direct customers of Consolidated Edison is denied.

The motion to dismiss the claims, based on the claim of superceding [sic] or intervening causes, is denied with leave to renew at the trial of this action. As the Court of Appeals noted in *Derdarian* v. *Felix Contracting* (51 NY2d 308) the unique nature of the inquiry mandated by this issue is a matter for the trial court and the finder of fact.

As the court stated in Derdarian, *supra*, p. 315:

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> "Where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed. In such a case, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's neglience (see Parvi v. City of Kingston, 41 NY2d 553, 560; Restatement, Torts 2d, §§ 443, 449; Prosser, Law of Torts, § 44). If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act which breaks the causal nexus (see, e.g., Martinez v. Lazaroff, 48 NY2d 819, 820; Ventricelli v. Kinney System Rent A Car, 45 NY2d 950, 952, supra; Rivera v. City of New York, 11 NY2d 856). Because questions concerning what is foreseeable and what is normal may be the subject of varying inferences as is the question of negligence itself, these issues generally are for the fact finder to resolve."

Finally, as to the defendant Con Edison's motion to dismiss on the grounds that the plaintiff cannot recover for governmental expenses occasioned and attributable to the blackout, the defendant has not provided any New York case law to this effect, rather the law seems to the contrary, (*see* New York State Thruway Authority v. John Civetta Construction Corp. 62 AD2d 530, City of New York v. Pullman, Inc. 662 F2d 910, cert. denied sub nom Rockwell International Corp. v. City of New York, ____ U.S. ____, 50 USLW 3548, United States v. Denver and Rio Grande Western Railroad Co. 547 F2d 1101. Accordingly, this branch of the motion to dismiss is denied.

Therefore, and for the reasons set forth—

The plaintiffs' motion for partial summary judgment is granted to the extent of resolving the issue of gross negligence against the defendant, Con Edison.

Opinion of the New York Supreme Court Granting Partial Summary Judgment in Koch

The defendant's cross motion to dismiss is granted solely as to the claims of the plaintiffs based on ordinary negligence, and the balance of the cross motions to dismiss are denied.

The cross motion for leave to interpose an amended answer, in the form submitted, is granted. [CPLR § 3025(b)]

Settle Order.

DATED: June 9th, 1982

/s/ M. J. D.
J. S. C.

Order of the New York Supreme Court Entering Partial Summary Judgment in *Koch*

Index No. 42091/78

PRESENT:

HON. MICHAEL J. DONTZIN

Justice.

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse, 60 Centre Street, New York, New York, on the 26th day of July, 1982.

EDWARD I. KOCH, as Mayor of the City of New York, THE CITY OF NEW YORK, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, NEW YORK CITY OFF-TRACK BETTING CORPORATION, BOARD OF EDUCATION OF THE CITY OF NEW YORK, BOARD OF HIGHER EDUCATION, CITY UNIVERSITY OF NEW YORK, NEW YORK CITY HOUSING AUTHORITY, TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, STATEN ISLAND RAPID TRANSIT OPERATING AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, THE LONG ISLAND RAILROAD COMPANY, METROPOLITAN SUBURBAN BUS AUTHORITY and CONSOLIDATED RAIL CORPORATION,

Plaintiffs,

—against—

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendant.

Order of the New York Supreme Court Entering Partial Summary Judgment in Koch

ORDER

The plaintiffs Edward I. Koch, as Mayor of the City of New York, the City of New York, New York City Health and Hospitals Corporation, New York City Off-Track Betting Corporation, Board of Education of the City of New York, Board of Higher Education, City University of New York, New York City Housing Authority, Triborough Bridge and Tunnel Authority, New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority, Staten Island Rapid Transit Operating Authority, Metropolitan Transportation Authority, the Long Island Railroad Company, Metropolitan Suburban Bus Authority and Consolidated Rail Corporation having moved this Court pursuant to Rule 3212(c) and (g) of the Civil Practice Law and Rules for an order:

(i) awarding partial summary judgment in favor of each of the plaintiffs herein and against the defendant Consolidated Edison Company of New York, Inc. ("Consolidated Edison") with respect to the defendant Consolidated Edison's liability for gross negligence, on the ground that, under the doctrine of collateral estoppel, a prior determination in another lawsuit (*Food Pageant, Inc.* v. *Consolidated Edison Co., Inc.*, Supreme Court, Bronx County, Index No. 16971/77) that the July 13-14, 1977 electric power failure and blackout in the New York City metropolitan area resulted from the gross negligence of the defendant Consolidated Edison, is conclusive and binding on the defendant Consolidated Edison in this action, and

(ii) directing that an immediate trial be held before the court and a jury to determine the amount and extent of the damages each of the plaintiffs herein is entitled to recover from the defendant Consolidated Edison; and

The defendant Consolidated Edison having cross-moved for (a) an order pursuant to Rule 3212(e) of the Civil Practice Law and Rules directing the entry of partial summary judgment in favor of the defendant and against the plaintiffs, dismissing all counts of the plaintiffs' Amended Complaint except the following:

Order of the New York Supreme Court Entering Partial Summary Judgment in Koch

¶ 31, but only to the extent this includes (1) claims by the City under its July 1974 Agreement with Con Edison for damages to its public buildings in The Bronx and Staten Island, directly caused by Con Edison's gross negligence leading to the interruption in service and (2) claims by the City for its "in rem" buildings served by Con Edison under individual accounts for damages directly caused by Con Edison's gross negligence leading to the interruption of service;

¶ 57(a), but only to the extent this is a claim by the Housing Authority for a few locations at which electric service was provided pursuant to individual accounts for damage to equipment directly caused by Con Edison's gross negligence leading to the interruption in service; and

¶ 67(b), but only to the extent this is a claim by Conrail under a contract with Con Edison for damages to its equipment directly caused by Con Edison's gross negligence leading to the interruption in service;

and (b) an order pursuant to Rule 3025(b) of the Civil Practice Law and Rules granting the defendant Consolidated Edison leave to amend its answer and permitting defendant to serve the proposed Verified Amended, Supplemental and Consolidated Answer submitted with its motion papers; and the grounds on which the defendant Consolidated Edison moved for partial summary judgment having been that:

(1) Plaintiffs' claim based on Con Edison's contracts with the Power Authority of the State of New York must be dismissed because as a matter of law plaintiffs are neither parties nor third-party beneficiaries of those contracts;

(2) Plaintiffs' claims based on their own contracts with Con Edison must be dismissed because as a matter of law the contracts do not permit recovery of damages of the kind sought herein;

(3) Plaintiffs' claims based on damages allegedly caused by Con Edison's ordinary negligence fail to state a cause of action

because Con Edison has not agreed to be liable for service interruptions resulting from ordinary negligence;

(4) The claims of plaintiffs who were non-customers on July 13, 1977 fail to state a cause of action because as a matter of law Con Edison owes no duty to them;

(5) Plaintiffs' claims for damages attributable to criminal activity, civil disturbances, municipal employee absenteeism and lost productivity must be dismissed because as a matter of law, superseding causes preclude imposition of liability upon Con Edison for such damages; and

(6) Plaintiffs' claims for reimbursement of municipal expenditures incurred during July 13-14, 1977 must be dismissed because plaintiffs cannot recover as damages the costs of governmental operations which they were created to perform; and

The plaintiffs' motion for partial summary judgment and the defendant's cross-motion for partial summary judgment and for leave to serve an amended answer having regularly come on to be heard at a Special Term, Part 1, of this Court on March 24, 1982, and due deliberation having been had; and an opinion dated June 9, 1982, having been duly rendered;

Now, upon reading and filing the plaintiffs' notice of motion for partial summary judgment pursuant to CPLR § 3212(c) and (g), dated December 3, 1981, and the affidavits of Stephen L. Cohen, sworn to December 3, 1981 and March 11, 1982, and Frank Milano, sworn to March 10, 1982, and the exhibits annexed to said affidavits, in support of the plaintiffs' motion and in opposition to the defendant Consolidated Edison's notice of cross-motion; and the defendant Consolidated Edison's notice of cross-motion for partial summary judgment under CPLR ¶ 3025(b), dated January 15, 1982, and the affidavits of Ernest J. Williams, sworn to January 15, 1982 and March 30, 1982, and William E. Hegarty, sworn to on March 30, 1982, and Thomas J. Kavaler, sworn to April 28, 1982, and the exhibits annexed to said affidavits, in opposition

to the plaintiffs' motion and in support of the defendant Consolidated Edison's cross-motion; and upon all proceedings heretofore had herein, and the opinion of this Court dated June 9, 1982; it is

ORDERED, that the plaintiffs' motion for partial summary judgment is granted to the extent of resolving the issue of gross negligence against the defendant, Consolidated Edison; and it is further

ORDERED, that the defendant Consolidated Edison's cross-motion for partial summary judgment dismissing the plaintiffs' amended complaint is granted solely as to the claims of the plaintiffs based on ordinary negligence, and that branch of the complaint containing such claims is dismissed and the balance of the cross-motion for partial summary judgment is denied; and it is further

ORDERED, that the defendant Consolidated Edison's cross-motion for leave to interpose an amended answer, in the form submitted with its motion papers, is granted and such answer shall be deemed served upon service of a copy of this order with notice of entry.

ENTER.

/s/ M. J. D.
J. S. C.

FILED
Jul 29, 1982
Co. Clerk's Office
New York

Order of the New York Supreme Court Denying Application to Re-settle the Order in *Koch*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: SPECIAL TERM PART I

Index No. 42091/78

Calendar No. 78

March 24, 1982

EDWARD I. KOCH, as Mayor of the City of New York, THE CITY OF NEW YORK, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, NEW YORK CITY OFF-TRACK BETTING CORPORATION, BOARD OF EDUCATION OF THE CITY OF NEW YORK, BOARD OF HIGHER EDUCATION, CITY UNIVERSITY OF NEW YORK, NEW YORK CITY HOUSING AUTHORITY, TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, STATEN ISLAND RAPID TRANSIT OPERATING AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, THE LONG ISLAND RAILROAD COMPANY, METROPOLITAN SUBURBAN BUS AUTHORITY and CONSOLIDATED RAIL CORPORATION,

Plaintiffs,

—against—

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendant.

Order of the New York Supreme Court Denying Application to Re-settle the Order in Koch

DONTZIN, J.:

The application to re-settle the Court's order of July 26th, 1982 is denied.

The proposed additional sentence appears to be contrary to the decision which left as "factual issues. . . to what extent plaintiffs' acts and superceding events impacted on the causal connection between Con Ed's conduct and the injury and damages claimed by the plaintiffs. . ." (page 6 of the Court's opinion)

The proposed amendment would appear to leave this matter open as a question of law.

Dated: August 24th, 1982

/s/ M. J. D.
J. S. C.

FILED
Aug 26, 1982
Co. Clerk's Office
New York

Order of the Appellate Division, First Judicial Department, Affirming the Order of the Supreme Court Entering Partial Summary Judgment in *Koch*

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 30, 1983

PRESENT:

Hon. THEODORE R. KUPFERMAN,
Justice Presiding.

SAMUEL J. SILVERMAN
MAX BLOOM
FRITZ W. ALEXANDER, II,
Justices.

EDWARD I. KOCH, as Mayor of the City of New York, THE CITY OF NEW YORK, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, NEW YORK CITY OFF-TRACK BETTING CORPORATION, BOARD OF EDUCATION OF THE CITY OF NEW YORK, BOARD OF HIGHER EDUCATION, CITY UNIVERSITY OF NEW YORK, NEW YORK CITY HOUSING AUTHORITY, TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, STATEN ISLAND RAPID TRANSIT OPERATING AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, THE LONG ISLAND RAILROAD COMPANY, METROPOLITAN SUBURBAN BUS AUTHORITY, and CONSOLIDATED RAIL CORPORATION,

Plaintiffs-Respondents,

—against—

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Defendant-Appellant.

Order of the Appellate Division, First Judicial Department, Affirming the Order of the Supreme Court Entering Partial Summary Judgment in Koch

An appeal having been taken to this Court by the above-named defendant-appellant from an order of the Supreme Court, New York County (Michael J. Dontzin, J.), entered on July 29, 1982, which *inter alia*, granted plaintiffs' motion for partial summary judgment to the extent of resolving the issue of gross negligence against defendant-appellant,

And said appeal having been argued by William E. Hegarty of counsel for appellant, and by Alfred Weinstein of counsel for respondents; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed, without costs and without disbursements.

ENTER:

Joseph J. Lucchi
Clerk.

Order of the Appellate Division, First Judicial Department, Granting Leave to Appeal in *Koch*

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on September 20, 1983

PRESENT:

Hon. THEODORE R. KUPFERMAN,
Justice Presiding.

SAMUEL J. SILVERMAN
MAX BLOOM
FRITZ W. ALEXANDER, II,
Justices.

EDWARD I. KOCH, as Mayor of the City of New York, THE CITY OF NEW YORK, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, NEW YORK CITY OFF-TRACK BETTING CORPORATION, BOARD OF EDUCATION OF THE CITY OF NEW YORK, BOARD OF HIGHER EDUCATION, CITY UNIVERSITY OF NEW YORK, NEW YORK CITY HOUSING AUTHORITY, TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, STATEN ISLAND RAPID TRANSIT OPERATING AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, THE LONG ISLAND RAILROAD COMPANY, METROPOLITAN SUBURBAN BUS AUTHORITY and CONSOLIDATED RAIL CORPORATION,

Plaintiffs-Respondents,

—against—

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Defendant-Appellant.

Order of the Appellate Division, First Judicial Department, Granting Leave to Appeal in Koch

The above-named defendant-appellant having moved for leave to appeal to the Court of Appeals from the order of this Court entered on June 30, 1982,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support of said motion and the papers filed in opposition or in relation thereto; and due deliberation having been had thereon,

It is ordered that the motion be and the same hereby is granted and this Court, pursuant to CPLR 5713, certifies that the following question of law, decisive of the correctness of its determination, has arisen, which in its opinion ought to be reviewed by the Court of Appeals:

> "Was the order of the Supreme Court, as affirmed by this Court, properly made?"

This Court further certifies that its determination was made as a matter of law and not in the exercise of discretion.

ENTER:

JOSEPH J. LUCCHI
Clerk.

Order of the Court of Appeals of the State of New York Denying Reargument in *Koch*

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixth day of September A.D. 1984

PRESENT,

HON. LAWRENCE H. COOKE,
Chief Judge, presiding.

1 Mo. No. 791

EDWARD I. KOCH, as Mayor of the City of New York, et al.,
Respondents-Appellants,

vs.

CONSOLIDATED EDISON COMPANY of New York, Inc.,
Appellant-Respondent.

SEYMOUR GILLMAN, Trustee & c.,
Respondent,

vs.

CONSOLIDATED EDISON COMPANY of New York, Inc.,
Appellant.

Order of the Court of Appeals of the State of New York Denying Reargument in Koch

A motion for reargument in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

/s/ DONALD M. SHERAW
Donald M. Sheraw
Clerk of the Court

Opinion of the New York Supreme Court Denying Summary Judgment in *Goldstein*

SUPREME COURT
BRONX COUNTY
SPECIAL TERM: PART I

Index No. 16822/79

MORRIS GOLDSTEIN, ET ANO.

—against—

CON ED CO. OF N.Y. INC. ET AL.

MERCORELLA, *J.*:

Motion by plaintiffs, Morris Goldstein and Ruth Goldstein for an order that the issue of negligence of the defendant, Con. Ed. Company of N.Y., Inc. be deemed resolved for purposes of this action and that this matter be set down for a hearing on the issue of damages or for an order striking this defendant's answer, entering a default judgment or for an order directing further examination before trial of Con. Ed and for further related relief and the cross-motion by Con Edison Company of N.Y., Inc. for summary judgment are disposed of as follows:

In this action, plaintiff and his wife seek to recover the sum of $300,000 for personal injuries and loss of services when the plaintiff, Morris Goldstein, fell on a public stairway in the multiple dwelling in which he resided during the blackout of July, 1977. The building owner and managing agents have been made co-defendants in the action.

Con-Edison argues that it is not liable for damages as a result of an interruption of service where there is no contractual obligation between the one who suffered the damage and the utility. Plaintiffs contend that in fact there does exist a contractual duty between Con-Edison and the plaintiffs, and

that even in the absence of a direct contractual duty there is a sufficient duty arising from the relation between the parties which duty was breached by Con-Edison, which breach caused injury to the plaintiffs.

Con-Edison submits in its memorandum of law a series of cases that are pertinent to the facts at hand but nevertheless distinguishable. As opposed to the plaintiffs in those cases, who were apartment dwellers, employees and the like and to which Con-Edison owed no contractual duty, the plaintiffs herein are owners of stock in a co-operative corporation as well as occupants in the building owned by their co-operative corporation under a proprietory [sic] lease. Plaintiffs are not simply tenants. As stockholders in this co-operative corporation who were paying for services being provided by Con-Edison, a direct contractual relationship exists between these parties, direct benefits flowing to Con-Edison in the form of electricity charges from the pockets of these stockholder-occupants who were directly provided electricity from Con-Edison. It appears further that even in the absence of this contractual relationship, Con-Edison may well be under a duty arising from the relationship of the parties that upon breach might obligate Con-Edison to compensate the plaintiffs for injuries arising from Con-Edison negligence. Accordingly, in that issues of fact and law remain to be adjudicated, which cannot be determined at this time upon this cross-motion, summary judgment is denied.

The motion by plaintiffs is granted only to the extent of directing the defendant by its representative Jack Feinstein to appear for further deposition at a time mutually agreeable to the parties at Special Term Part I of Bronx County no later than 20 days after service of a copy of the order to be settled hereon with notice of entry. All other relief is denied at this time. Matters that necessitate the court's intervention and ruling are to be brought to the attention of the justice presiding at Special Term.

Settle order.

/s/ A. J. M.

DATED: Feb 1, 1982 J. S. C.

Opinion and Order of the New York Supreme Court Denying Partial Summary Judgment In *Goldstein*

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Index No. 16822/79

MORRIS GOLDSTEIN, ET ANO.,

Plaintiffs,

—against—

CON. ED. CO. OF N.Y. INC., ET AL.,

Defendants.

MERCORELLA, *J.*:

This action arises from the 1977 New York City blackout which resulted in the loss of electrical power by millions of businesses and households in the metropolitan area. Plaintiffs Morris Goldstein and Ruth Goldstein seek damages for personal injury to Morris Goldstein and loss of services of her husband to Ruth Goldstein as a result of Mr. Goldstein's fall on a staircase during the power failure. This fall occurred in the apartment building owned by the cooperative corporation in which Mr. Goldstein has a stock interest.

Plaintiffs' cause of action against defendant Consolidated Edison Company is predicated upon this defendant's alleged gross negligence which resulted in the power shortage. The cause of action against defendant Lind-Ric Housing Co., Inc. is based upon the allegation that this defendant failed to provide proper emergency lighting on the staircase where Mr. Goldstein fell. In this application before the Court, plaintiffs

move for partial summary judgment against defendant Consolidate Edison directing that this defendant was grossly negligent with respect to the 1977 power failure. Defendant Consolidated Edison cross-moves to amend its answer to assert certain affirmative defenses. The motion and cross-motion are decided as follows:

Plaintiffs' motion for partial summary judgment is founded upon the doctrine of collateral estoppel, based upon a prior determination in another lawsuit relating to the 1977 blackout. In this prior action, Food Pageant, Inc. v. Consolidated Edison Co., Inc., a jury returned a verdict finding that the defendant had been grossly negligent, that this gross negligence was the proximate cause of plaintiff's damages for food spoilage and loss of business, and that plaintiff was entitled to compensation in the amount of $40,500.00. This judgment was affirmed by the Appellate Division, without opinion, and the jury verdict finding defendant to have been grossly negligent was permitted to stand by the Court of Appeals. (Food Pageant, Inc. v. Consolidated Edison Co., Inc., 54 N.Y. 2d 167).

Plaintiffs maintain that the determination as to defendant's gross negligence in the *Food Pageant* case is, under the doctrine of collateral estoppel, binding and conclusive on the defendant. (It is to be noted that even if Consolidated Edison were to be barred from relitigating the matter of gross negligence, plaintiffs would still have to establish a causal connection between the gross negligence and plaintiffs' personal injuries.) Before the collateral estoppel doctrine can be invoked, there must exist two factors. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and second, there must have been a full and fair opportunity to contest the decision now said to be controlling (Schwartz v. Public Administrator, 24 N.Y. 2d 65). It has been generally accepted that the collateral estoppel doctrine may be used in an "offensive" fashion by a plaintiff against a defendant to avoid relitigation of an issue already determined in a prior action to which the defendant was a party.

Opinion and Order of the New York Supreme Court Denying Partial Summary Judgment In Goldstein

Initially, it would seem that the collateral estoppel argument advanced by plaintiffs should be adopted by the Court and that partial summary judgment as to the gross negligence of Consolidated Edison is warranted. It is evident that there exists an identity of issue, namely gross negligence, between this action and the *Food Pageant* case, and that this issue is decisive of the present action. Moreover, the Court finds that Consolidated Edison had a full and fair opportunity to contest the *Food Pageant* determination and did vigorously defend in that prior action.

Nonetheless, a closer examination leads the Court to a different conclusion. It is widely acknowledged that collateral estoppel is a flexible doctrine which should not be rigidly or mechanically applied. (Gilbert v. Barbierei, 53 N.Y. 2d 285). Certain circumstances surrounding the instant action militate against application of the doctrine in this case.

It has been held that collateral estoppel should not be used in the multiple claimant situation where unfairness would result. (Vincent v. Thompson, 50 A.D. 2d 211). It is evident that multiple claims have been filed against Consolidated Edison and many are still pending. The potential for unfairness to a defendant in such instances is illustrated in this matter wherein the prior judicial determinations in the 1977 blackout cases have been in the defendant's favor. (See, for example, Lovico v. Consolidated Edison Co., 99 Misc. 2d 897; Lee v. Consolidated Edison Co. of N.Y., 98 Misc. 2d 304; Penichet v. Consolidated Edison Co., N.Y.L.J., May 1, 1980, p. 7 col. 2; Lehman v. Consolidated Edison Co., N.Y.L.J., March 25, 1980, p. 10, col. 6; Finkelstein v. Consolidated Edison Co., N.Y.L.J., May 1, 1979, p. 13, col. 3). To grant a collateral estoppel bar to relitigation of the gross negligence issue based upon the first successful suit brought by a claimant would clearly prejudice the defendant. Plaintiffs argue that these prior determinations favorable to the defendant were, for the most part, the results of suits brought in the small claims courts by small businesses and private citizens. The plaintiffs state that in these actions no proof was offered on the matter of defendant's gross negligence and they are clearly distin-

guishable from the *Food Pageant* case in which plaintiff was fully prepared to prove gross negligence. The plaintiffs in effect urge that the prior decisions favorable to Consolidated Edison cannot truly be viewed as contrary decisions on the issue of gross negligence. The Court discounts plaintiffs' contentions. Certainly the claimants in all prior actions had a full and fair opportunity to attempt to prove gross negligence, nor were all the favorable determinations which were secured by the defendant prompted solely by the unsophisticated presentation of the suits by the unsuccessful claimants. Indeed, in Lehman v. Consolidated Edison Co., *supra*, the Court had considered an investigative report of the blackout conducted by New York State, and in Lee v. Consolidated Edison Co., *supra*, the Court considered various investigative reports.

Therefore, in light of the above, this Court concludes that the application of the doctrine of collateral estoppel is not warranted in this action. Accordingly, plaintiffs' motion for partial summary judgment is denied.

The cross-motion by defendant Consolidated Edison to amend its answer to assert additional affirmative defenses is also denied. This denial is with leave to renew upon submission of proper papers including an affidavit establishing the merits of the proposed defenses and setting forth the reasons for the delay in moving to amend.

/s/ A. J. M.
J. S. C.

Dated: July 20, 1982

FILED
Jul 22, 1982
Bronx County Clerk's Office

Order of the Appellate Division, First Judicial Department, Dismissing Appeal in *Goldstein*

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 30, 1982

PRESENT:

HON. FRANCIS T. MURPHY, JR.,
Presiding Justice
THEODORE R. KUPFERMAN
LEONARD H. SANDLER
ARTHUR MARKEWICH
E. LEO MILONAS,
Justices

MORRIS GOLDSTEIN and RUTH GOLDSTEIN,

Plaintiffs-Appellants,

—against—

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., WILLIAM KENNEDY, LIND-RIC HOUSING CO., INC., and PHILLIPS, WOOD, DOLSON, INC.,

Defendants-Respondents.

Order on Motion to Dismiss Appeal

An appeal having been taken to this Court by the plaintiffs-appellants from the order of the Supreme Court, Bronx County, entered on or about July 20, 1982,

And the respondent Consolidated Edison Company of New York, Inc. having moved to dismiss said appeal,

Order of the Appellate Division, First Judicial Department, Dismissing Appeal in Goldstein

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support of said motion, and the papers filed in opposition or in relation thereto; and due deliberation having been had thereon,

It is ordered that the motion to dismiss said appeal be and the same hereby is granted as to movant with $20 costs, unless the appellants perfect the appeal for the April 1983 Term of this Court. Upon failure to so perfect the appeal, an order dismissing the appeal as to movant may be entered ex parte, provided a copy of this order is served upon the appellants by the movant within ten days after the date of entry hereof.

ENTER:

JOSEPH J. LUCCHI
Clerk.

Opinion of the Appellate Division, First Judicial Department, Modifying the Order of the Supreme Court in *Goldstein*

SUPREME COURT
APPELLATE DIVISION

First Department, January 1983

THEODORE R. KUPFERMAN, *J.P.*
LEONARD H. SANDLER
JOHN CARRO
SIDNEY H. ASCH
BENTLEY KASSAL, *JJ.*

MORRIS GOLDSTEIN and RUTH GOLDSTEIN,
Plaintiffs-Appellants,

—against—

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and LIND-ROC HOUSING CO., INC.,
Defendants-Respondents,

—and—

WILLIAM KENNEDY, WILLIAM JURITH and PHILLIPS, WOOD, DOLSON, INC.,
Defendants.

Appeal by the plaintiffs-appellants from an order of the Supreme Court, Bronx County (Mercorella, J.), entered on July 22, 1982 which denied their motion for partial summary judgment.

Opinion of the Appellate Division, First Judicial Department, Modifying the Order of the Supreme Court in Goldstein

JULIAN KAPLAN, of counsel (Jessel Rothman, P.C., attorney) *for the plaintiffs-appellants*

WILLIAM E. HEGARTY, of counsel (Thomas J. Kavaler, Vincent E. Gentile and Lisa Schilit with him on the brief; Cahill, Gordon & Reindel and Ernest J. Williams, attorneys) *for defendant-respondent Consolidated Edison*

KUPFERMAN, *J.P.*

Plaintiffs, Morris and Ruth Goldstein, appeal from the denial by Special Term of their motion for partial summary judgment against defendant Consolidated Edison Corp. (Con Ed). By that motion, plaintiffs sought an order precluding Con Ed from relitigating the issue of whether it was grossly negligent in failing to prevent the interruption of electrical service during the 1977 blackout, and setting the matter down for an inquest to assess plaintiffs' damages. Special Term should have granted the motion to the extent of precluding Con Ed from again litigating the gross negligence issue, reserving all other matters for trial.

On the morning of July 14, 1977, plaintiff Morris Goldstein allegedly sustained personal injuries when he slipped and fell down a darkened stairwell in a cooperative ownership apartment building in the Bronx in which plaintiffs reside and own shares. Plaintiff Ruth Goldstein, his wife, joins her claim for loss of services resulting from her husband's alleged injuries. In addition to Con Ed, the complaint names as defendants the cooperative apartment corporation, its managing agent, and two individual employees of Con Ed. The motion for partial summary judgment, however, is directed solely against Con Ed.

Plaintiffs predicate their motion on a judgment entered after a jury verdict which specifically found as a fact that Con Ed

had acted with gross negligence in failing to prevent the blackout. The Court of Appeals affirmed our Court's affirmance without opinion of that judgment. *Food Pageant, Inc. v. Consolidated Edison Corp.*, 54 N.Y.2d 167, *affirming* 78 A.D.2d 1016. Plaintiffs now invoke the doctrine of offensive collateral estoppel, also called issue preclusion, to give the finding of gross negligence in the *Food Pageant* judgment conclusive effect in this litigation.

Under New York law, for a non-party to an action which resulted in a judgment to use that judgment offensively in a later action to preclude a party to that judgment from relitigating an issue of fact found adversely to that party in the prior action, a twofold requirement must be met. As the Court of Appeals stated the standard:

> "New York Law has now reached the point where there are but two necessary requirements for the invocation of the doctrine of collateral estoppel. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling."

Schwartz v. Public Administrator of the County of the Bronx, 24 N.Y.2d 65, 71.

In *Schwartz*, the Court of Appeals stated further that the burden rests upon the defendant to show that collateral estoppel should not be applied because it did not have a full and fair opportunity to litigate the issue in the prior action, while the burden is placed on the moving party to show that the issue is identical and was necessarily decided in the prior action. 24 N.Y.2d at 73.

The identity of issue requirement is clearly met. In *Food Pageant*, the jury decided that Con Ed was grossly negligent in failing to prevent the blackout. This issue was necessarily decided in that case inasmuch as the jury was instructed that there could be no recovery absent a finding of gross negligence on the part of Con Ed because Con Ed was exempt from liability for ordinary negligence under the terms of its tariff

restrictions approved by the Public Service Commission. Though the finding in *Food Pageant* is not dispositive of the Goldsteins' claim, it is certainly decisive of the motion for partial summary judgment. Thus, the issue on this appeal is whether Con Ed had a full and fair opportunity to litigate the gross negligence issue in the *Food Pageant* action so that allowing issue preclusion in this case would not be unjust. On this question, Con Ed has the burden.

The Court of Appeals has set the standard for determining whether a party has had a full and fair opportunity to litigate an issue as requiring:

> ". . . an exploration of the various elements which make up the realities of litigation. A comprehensive list of the various factors which should enter into a determination whether a party has had his day in court would include such considerations as the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law and foreseeability of future litigation."

Schwartz v. Public Administrator of the County of Bronx, supra, 24 N.Y.2d at 72.

Of the nine considerations listed above, only "indications of a compromise verdict" even remotely avails Con Ed in its attempt to avoid the conclusive effect of the finding of gross negligence by the *Food Pageant* jury. The *ad damnum* clause in the *Food Pageant* complaint sought $75,000 in damages. Even in light of the enormity of the potential exposure of Con Ed to blackout claims, this is not such an insubstantial claim that it would not have been vigorously contested. Con Ed certainly foresaw future litigation and had to have been aware than an adverse finding in *Food Pageant* could have collateral effect. The case was tried in Supreme Court, Bronx County, between April 27 and May 9, 1979, and two appeals were taken. Thus, the trial forum of the litigation was a court of record and the extent of the litigation was substantial, indicating the use of

initiative. At trial, Con Ed was represented by in-house counsel, and on both appeals had retained a prestigious firm to be of counsel.

There is no allegation of a significant change in the applicable law.

The investigative reports referred to by Con Ed in its argument as not having been part of the record in the *Food Pageant* trial were all released and available at the time of that trial. Therefore, the consideration of "availability of new evidence" is inapplicable inasmuch as Con Ed surely had the opportunity to introduce those investigative reports.

To meet its burden of showing that the *Food Pageant* trial was not a full and fair opportunity to litigate the gross negligence issue, Con Ed refers to the fact that the *Food Pageant* jury awarded exactly half the damages claimed. From this fact alone we are asked to infer that the jury compromised on the issue of whether Con Ed was grossly negligent, despite the fact that the jury unanimously answered affirmatively the specific interrogatories presented by the trial justice whether Con Ed was grossly negligent, and, if so, whether such gross negligence proximately caused plaintiff's injuries.

This reduced award of damages by the *Food Pageant* jury is susceptible of other inferences as well. The jury may well have been merciful in light of Con Ed's public responsibility and vast exposure.* Food Pageant's claims were $38,000 for food spoilage and $43,000 for lost profits. The jury may have considered plaintiff's claims exaggerated. These suppositions are as plausible as Con Ed's contention, and within the province of the jury. How the jury arrived at the award it did is a matter of conjecture.

In *Strauss v. Belle Realty Co., et al.*, No. 9917/79 (Supreme Court, Queens Co., June 24, 1982), a blackout case practically identical to the case at bar, Justice Buschmann, in granting plaintiff's motion for partial summary judgment, aptly described Con Ed's contention that the *Food Pageant* verdict

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* We are advised that approximately 285 blackout cases are pending against Con Ed, seeking total damages in excess of $200 million.

was a compromise on liability as "unsubstantiated speculation." The appeal from that order is currently *sub judice* in the Appellate Division, Second Department, along with a companion case, *Shaid v. Consolidated Edison Corp.*, No. 3802/78 (Supreme Ct., Queens Co., June 7, 1982). In *Shaid,* Justice Durante denied the plaintiff's summary judgment motion on the ground that factual issues of proximate cause and the scope of defendant's duty required a trial. It is not clear from the decision in *Shaid* whether plaintiff sought only partial summary judgment as in the case at bar or total summary judgment. Nonetheless, Justice Durante described Con Ed's argument that the *Food Pageant* verdict was a compromise as "mere speculation."

Con Ed has simply failed to meet its burden of proving that it was denied a full and fair opportunity to litigate the gross negligence issue such that allowing issue preclusion would be unfair because of a compromise verdict, or for any other reason.

In denying the Goldsteins' motion for partial summary judgment, Special Term correctly stated that there existed identity of issue, that the issue was decisive, and that Con Ed had a full and fair opportunity to litigate the issue and did vigorously defend against the *Food Pageant* claim. However, Special Term declined to apply collateral estoppel on the ground that it would be unfair in light of several cases brought in Small Claims Court in which Con Ed was victorious either at trial or at the Appellate Term. Relying on *Vincent v. Thompson,* 50 A.D.2d 211, for the rule that collateral estoppel should not be applied in a multiple claimant situation where unfairness would result, Special Term denied the motion. *Vincent v. Thompson,* a pharmaceutical products liability case, is inapposite to the case at bar because, in *Vincent,* the reasons for reversal of the trial court's application of issue preclusion were a lack of identity of issue, and newly discovered evidence.

This case does not present the "multiple plaintiff anomaly" situation. (*See* Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine,* 9 Stanford L. Rev. 281, 304 (1967); *Restatement (Second) of Judgments* § 29(4) (1982)). Con Ed's

victories in cases brought in the Small Claims Part of the New York City Civil Court have no precedential value, nor do they preclude the claimants from bringing an action in Supreme Court on their claims against Con Ed. *See* § 1808 New York City Civil Court Act, McKinneys Book 29A (1963). That section provides that a judgment obtained in Small Claims Part of the New York City Civil Court has *res judicata* effect only up to the amount involved in the action, and "shall not be deemed an adjudication of any fact at issue or found therein in any other action or court."

We are referred to no case tried in a court of record in which a final determination has been made denying recovery to a blackout plaintiff on the ground that Con Ed was not grossly negligent. Thus, whether certain plaintiffs are allowed partial summary judgment on that issue while others are required to prove Con Ed's gross negligence at trial is quite immaterial in terms of the multiple plaintiff anomaly. The blackout litigation simply does not present the situation where a number of plaintiffs have lost their claims by a final adjudication on the merits and then one plaintiff wins and all remaining plaintiffs use the successful plaintiff's judgment to sustain their claims. That kind of injustice, which the United States Supreme Court declared would render issue preclusion inappropriate, *see Parkland Hosiery v. Shore,* 439 U.S. 322, 330, is not present where the inconsistent determinations involve only the grant or denial of summary relief to plaintiffs.

In addition to the alleged unfairness of inconsistent determinations among multiple plaintiffs discussed above, Con Ed argues on this appeal that the policies behind issue preclusion would not be served by its application in this case. The argument involves an unfounded contention that issue preclusion is impermissible where issues of comparative fault are present. Con Ed argues that for the jury to be able to apportion damages fairly it must hear evidence of Con Ed's gross negligence to compare that negligence with any negligence on the part of other parties. This argument is specious inasmuch as it is the effect rather than the quality of the respective acts of negligence which the jury must compare. The jury will be instructed that Con Ed was grossly negligent in

failing to prevent the blackout, but that any award made to plaintiffs must be reduced by the proportion of that award which the jury determines is attributable to the negligence of the plaintiffs or other defendants. *See New York Pattern Jury Instructions*, § 2:36 (Supp. 1979).

Con Ed further argues in support of its contention that the policy behind issue preclusion, of conserving judicial resources, would not be served by its application in this case, because plaintiffs generally would be discouraged from utilizing statutory joinder devices in multiple claimant litigation. Though it may be so that more cases will be docketed as a result of permitting issue preclusion in multiple plaintiff litigation, the extent of litigation in each case will be reduced thus fulfilling the objective of "discouraging redundant litigation." *See Gramatan Home Investors Corp. v. Lopez*, 46 N.Y.2d 481, 485. In *State of Maryland v. Capital Airlines, Inc.*, 267 F. Supp. 298 (applying Federal law), the Court stated after holding the United States estopped from relitigating the negligence of Federal Aviation Authority employees in connection with a mid-air collision:

> ". . . the court has taken into account not only the right of society to have its courts render justice as inexpensively as possible and the right of each litigant to have his day in court, but also the rights of other litigants who might have to wait to have their day in court because one litigant is allowed to litigate the same issue over and over again."

267 F. Supp. at 304.

Analogous issues of procedure are present in the plane crash mass disaster litigations and the blackout cases, except that, in the latter, a wider variety of types of injury results, making class action treatment less feasible. However, in both contexts, the rights of large numbers of claimants depend upon an identical issue of negligence *vel non* to be determined from a particular factual setting. In *Hart v. American Airlines Corp.*, 61 Misc.2d 41, the court gave preclusive effect to a finding made by a Texas court that the airline was negligent in connection with a plane crash in Kentucky. In so holding, the court cited *Schwartz v. Public Administrator of the County of*

Bronx, supra, stating that a court should not ". . . 'tolerate a condition where, on relatively the same set of facts, one fact-finder, be it court or jury' may find a party liable while another exonerates him leading to the 'inconsistent results which are always a blemish on a judicial system.' " 61 Misc.2d at 44.

Nor is Con Ed's reliance on public policy and due process arguments availing. Con Ed argues that public policy considerations weigh against allowing issue preclusion in blackout cases because of the adverse impact on the consuming public of higher electric rates.

The maxim *Fiat Justitia et ruant coeli* (let justice be done though the heavens fall) may well apply.

On the due process ground, Con Ed argues that allowing issue preclusion here would contravene the policy of fundamental fairness embodied under due process of law. Inasmuch as Con Ed was afforded a full and fair opportunity to litigate the issue of gross negligence, and has failed on this appeal to come forward with the "compelling showing of unfairness" required to justify not giving conclusive effect to the prior finding, see Comment j to § 28 Restatement (second) Judgments (1982), earlier version, Comment j to § 68.1 tentative draft no. 4 Restatement (second) Judgments, cited with approval, *Gilbert v. Barbieri*, 53 N.Y.2d 285, 303 n 3, due process.

Accordingly, the order entered in Supreme Court, Bronx County (Mercorella, J.), on July 22, 1982, which denied plaintiffs' motion for partial summary judgment precluding Con Ed from relitigating the issue of its gross negligence *val non* and setting the matter down for an inquest to assess plaintiffs' damages against Con Ed, should be modified, on the law, with costs, to grant so much of plaintiffs' motion as sought to preclude Con Ed from relitigating the gross negligence issue, and otherwise affirmed, and the matter remanded for a trial on the remaining issues including causation and comparative negligence.

All concur except SANDLER, *J.* who dissents in an Opinion.

Opinion of the Appellate Division, First Judicial Department, Modifying the Order of the Supreme Court in Goldstein

SANDLER, *J.* (dissenting)

Let me acknowledge that the conclusion reached by a majority of this Court will yield important practical benefits in permitting a substantial saving of time and expense in the disposition of the multiple lawsuits that followed the blackout of 1977. I do not believe that the result reached is as fair as it is practical, or that it reflects appropriate consideration of several factors that are generally recognized as weighing against the application of issue preclusion in the absence of mutuality. Although Justice Kupferman's able and persuasive opinion accurately states the criteria detailed by the Court of Appeals in *Schwartz v. Public Administrator*, 24 NY2d 65, it does not seem to me to apply them to the complex situation presented here with that flexibility in the interest of justice that is the central principle in the application of issue preclusion. See *Schwartz v. Public Administrator, supra*, at 73; *Gilberg v. Barbieri*, 53 NY2d 285, 293; see also Restatement, Second, Judgments, Title B, Issue Preclusion, pp. 249, 250.

On the tenuous basis of a single judgment for $40,500, entered upon a jury verdict disclosing unmistakable indicia of compromise, in a property damage case which presented no issue as to causation or the negligence of the plaintiff, and in which the jury's resolution of the issue here relied on was directly contrary to determinations by judges in several small claims actions, the Court is sustaining the offensive use of collateral estoppel to preclude the defendant from relitigating the issue of culpability of its conduct in almost 300 lawsuits involving enormous potential liability, and arising out of widely varying factual circumstances, many of which will present separate and varied issues as to causation and the negligence of plaintiffs. I have been unable to find a single reported decision anywhere in the country in which issue preclusion was sustained under circumstances remotely comparable to those here. See *Mutuality of Estoppel As Prerequisite Of Availability Of Doctrine Of Collateral Estoppel To A Stranger To The Judgment*, 31 ALR 3rd 1044.

Opinion of the Appellate Division, First Judicial Department, Modifying the Order of the Supreme Court in Goldstein

The basic principles governing the application of issue preclusion in this state were set forth by the Court of Appeals in *DeWitt v. Hall*, 19 NY2d 141, and *Schwartz v. Public Administrator, supra*. Following the leading case of *Bernhard v. Bank of America Nat. Trust & Sav. Asso.*, 19 Cal. 2d 807, 122 P2d 892, the Court of Appeals joined the modern trend, albeit a trend still resisted by many jurisdictions, to eliminate the traditional requirement of mutuality in the application of issue preclusion. Both cases involved vehicular accidents, as to which the number of potential litigants and lawsuits was sharply limited, and both applied issue preclusion in the second of the two lawsuits arising out of each accident.

This appeal represents the first time that an appellate court in this state has been confronted with the proposed application of the principles subscribed to in *DeWitt* and *Schwartz* to the multiple claimant situation. Indeed, the application of those principles to the multiple claimant situation appears to have been addressed throughout the country in a surprisingly limited number of reported decisions, several involving airplane accidents. These decisions disclose divergent results, apparently turning for the most part on the particular circumstances presented in each case, although in part reflecting differences in approach. See e.g. *Parklane Hosiery v. Shore*, 439 US 322; *United States v. United Air Lines*, 216 F. Supp. 709, affd in part and revd in part *sub nom United Air Lines v. Winer*, 335 F2d 379, cert dismd 379 US 951; *Gliedman v. Capital Airlines*, 267 F.Supp. 298; *Zdanok v. Glidden*, 327 F2d 944, cert den 377 US 934; *Berner v. British Commonwealth Pacific Airlines Ltd.*, 346 F2d 532, cert den 382 US 983; *Navarov v. Caldwell*, 161 Cal App 2d 762, 327 P2d 111; *Bahler v. Fletcher*, 257 Or. 1, 474 P2d 329; *State Farm Fire & Cas. Co. v. Century Home Components Inc.*, 275 Or. 97, 550 P2d 1185.

Undeniably the prevailing view has rejected the thesis advanced by Professor Currie, on the basis of the widely discussed "multiple-claimant anomaly", that issue preclusion should never be applied offensively in such cases (Currie, "Mutuality of Collateral Estoppel: Limits of the Bernhard

Doctrine", 9 Stanford L.Rev. 281), a thesis which Currie himself later acknowledged to be erroneous (Currie, "Civil Procedure: The Tempest Brews", 53 Cal. L.Rev. 25).

On the other hand, there appears to be no reported appellate decision asserting that the presence of multiple claimants, particularly in cases in which the issue of liability is to be decided on the basis of a choice among different possible factual inferences, may not be a factor to be considered in evaluating the fairness of applying issue preclusion. Indeed, that possibility is quite clearly recognized in several leading authorities. See *Zdanok v. Glidden, supra*, at 955, 956; *Berner v. British Commonwealth Pacific Airlines Ltd., supra*, at 541; of *Parklane Hosiery v. Shore, supra*, at 330-332.

A study of the record discloses the presence here of four circumstances which, taken together, require denial of plaintiffs' motion to apply issue preclusion against the defendant on the basis of the single jury verdict in the *Food Pageant* case.

First, the amount at issue in *Food Pageant* was insignificant in relation to the enormous liability confronting the defendent in the several hundred pending lawsuits in which it is sought to preclude the defendant from relitigating the culpability of its conduct. Instructive in this connection is the Introductory Note in the Restatement of Judgments, Second (1980), to the several sections dealing with issue preclusion (§§ 27 through 29), sections which, together with the accompanying Comments, Illustrations, and Reporters' Notes, constitute the most systematic, balanced and thoughtful exposition of the principles that have evolved in the area with which we are concerned.

The Introductory Note includes the following observation (at p. 249):

> "There are a number of instances in which the policies against relitigation of an issue may be overcome. For example, . . . when the amount in controversy in the subsequent action far exceeds that involved in the initial action, unyielding application of estoppel doctrine may operate unfairly against the party who is precluded from relitigating an issue. Conversely, if a party is aware of the

potential (and perhaps not wholly forseeable) preclusive effects of a judgment, he may feel compelled to overlitigate an issue, or to pursue an appeal that might not otherwise be taken, out of fear of the consequences in later litigation."

In this case, the potential liability of the defendant "far exceeds" the amount that was at issue in the *Food Pageant* case. Indeed, the situation here is more extreme than that contemplated in the quoted language, which appears to have been addressed to the more traditional problem in which an issue determined in one lawsuit is sought to be relitigated in a second case between the same parties.

In the retrospective light of this Court's decision, the defendant, as a litigant in *Food Pageant*, was confronted with the following disquieting prospect. A favorable verdict would have been of no benefit whatever in any of the multiple pending lawsuits other than to avoid the application of issue preclusion here sought. A determination adverse to the defendent, however, would effectively and irremediably establish the culpability of its conduct in hundreds of cases involving potential liability running into millions of dollars.

Admittedly there is inherent in the elimination of the mutuality requirement the judicial acceptance, in the interest of avoiding issue relitigation, of some inequality between a party precluded by a prior adverse determination in a lawsuit and an opposing party who would not have been precluded by a contrary determination. But, as suggestd in the quoted Comment from the Restatement, the argument for that principle is more compelling where, as in the usual situation, there is a reasonably proportionate relationship between the amount at issue in the first litigated case and that which is at issue in later cases. It seems to me of doubtful fairness to confront any litigant, even one as large as Consolidated Edison, with such an immense gulf between benefit to be derived from a successful outcome in a lawsuit and the detriment to be suffered from an adverse determination. At a minimum, the presence of such a circumstance demands a very close judicial scrutiny of the

first verdict to make certain that it is in fact just to give it such disproportionate consequences.

Second, the verdict in *Food Pageant* bears on its face unmistakable evidence of compromise. Recovery was sought in that property damage case in the sum of $81,000 and the jury returned a verdict for precisely half that amount—$40,500.

In *Schwartz v. Public Administrator, supra*, at p. 72, the Court of Appeals specifically listed "indications of a compromise verdict" among the factors to be weighed with regard to the application of issue preclusion, and this principle is now uniformly accepted. See Restatement, Second, Judgments, § 29(5). The Court of Appeals did not require, as the opinion of this Court suggests, that there be conclusive proof that the verdict represented a compromise, or that every other possible explanation of the verdict must be excluded with mathematical certainty. The words used in *Schwartz* were "indications of a compromise verdict", and here those indications are compelling on any realistic evaluation of what occurred.

Third, in *Food Pageant*, an action for property damage, no issue of plaintiff's culpable conduct contributing to the loss was presented. In this case, and this may reasonably be assumed to be the fact in many of the pending lawsuits, the possible negligence of the plaintiff will clearly be an issue. In the Restatement of Judgments, Second, § 29, Illustration 6, the principle is specifically advanced that preclusive effect should not be given to the determination of a defendant's negligence where the first verdict was for a plaintiff as to whom no issue of his own culpable behavior was presented and it is sought to apply that verdict preclusively against the defendant in an action on behalf of a plaintiff as to whom such an issue is presented.

It is, of course, true that in *Schwartz v. Public Administrator, supra*, the Court in fact sustained issue preclusion in a case presented precisely the situation posed in Illustration 6. It is not clear whether the relevance of the factor, not specifically discussed in the *Schwartz* opinion, had been argued to the Court. It is also possible that at the time *Schwartz* was decided, many years before the Restatement of Judgments, Second, was

completed, the pertinence of the factor described in Illustration 6 had not yet come to be appreciated.

In any event, I do not believe that the *Schwartz* holding denies this Court the right to consider that factor as a relevant one to be evaluated with others in determining the appropriateness of issue preclusion. Given the fact that the Restatement of Judgments, Second, was completed only recently, after many years of painstaking work, and that it represents the most definitive and systematic treatment of the issues with which we are concerned, a circumstance identified in it as by itself negating the application of issue preclusion may at least be considered by us as one among other factors to be considered.

Fourth, the jury verdict in *Food Pageant* was inconsistent with determinations of the same issue previously reached by Civil Court judges in several small claims actions. The principle is of course now well-established that prior inconsistency of results is a significant factor to be considered in determining the appropriateness of issue preclusion. See Restatement, Second, Judgments, § 29(4). It is a safe assumption that this was not among the criteria listed in *Schwartz* only because the facts of that lawsuit disclosed no such prior inconsistency, and indeed the very nature of the situation addressed in *Schwartz* would not have lent itself to the possibility of such inconsistency.

It does not seem to me a satisfactory answer for the Court's opinion to note the limited *res judicata* effect provided by statute to determinations in the Small Claims parts. The issue here is not whether those determinations should be given affirmative *res judicata* effect. It is rather whether the conclusion reached quite consistently in several different cases ought not to be given weight in determining the justice of applying issue preclusion against the defendant on the strength of a single subsequent contrary jury verdict.

In an opinion which strongly affirmed the appropriateness of issue preclusion in multiple claimant cases, the Supreme Court of Oregon nonetheless denied the application of issue preclusion because of prior inconsistent results on the issue in question: "Those courts and commentators which have consid-

ered the question are in virtually unanimous agreement that where outstanding determinations are actually inconsistent on the matter sought to be precluded, it would be patently unfair to estop a party by the judgment it lost." *State Farm Fire & Cas. Co. v. Century Home Components Inc., supra*, 550 P.2d at 1191.

Let me agree that several of the small claims judgments do not seem entitled to significant weight on the issue before us. I do not believe that the factual determination reached in *Lee v. Consolidated Edison of New York*, 95 Misc.2d 120, revd on other grounds, 98 Misc.2d 304, may be so quickly dismissed. The opinion discloses a finding by a Civil Court judge that gross negligence had not been established on the basis of a close study of several reports by public agencies detailing careful and comprehensive investigations into the events surrounding the blackout.

Of course, this method of factual determination is not the usual one in our system of jurisprudence, in which factual issues are normally determined on the basis of adversarial presentations. But on any realistic view it seems to me clear that a factual determination conscientiously reached by an able and experienced judge on the basis of the study disclosed in the opinion is comparable in its reliability to a determination by a six-person jury in a property damage action against Consolidated Edison. In my opinion, the finding in *Lee v. Consolidated Edison of New York, supra*, is sufficiently trustworthy to be entitled to serious consideration in evaluating the fairness of enforcing issue preclusion against the defendant in this case.

A further Comment in the Restatement of Judgments, Second, is instructive. Although not addressed to the specific problem of the affirmative use of issue preclusion in multiple claimant cases, it seems to me singularly pertinent to the issues presented on this appeal. The following was said in § 29 (Comment g):

> "Ambivalence of prior determination. The circumstances attending the determination of an issue in the first action may indicate that it could reasonably have been

resolved otherwise if those circumstances were absent. Resolution of the issue in question may have entailed reference to such matters as the intention, knowledge, or comparative responsibility of the parties in relation to each other. Particularly where the issues have been tried to a jury, the circumstances may suggest that the issue was resolved by compromise or with more or less conscious reference to such matters as insurance coverage or the litigants' relative financial position. In these and similar situations, taking the prior determination at face value for purposes of the second action would extend the effects of imperfections in the adjudicative process beyond the limits of the first adjudication, within which they are accepted only because of the practical necessity of achieving finality."

I appreciate that the position urged in this dissent, if it had been accepted, would have raised questions to which there are no simple or clear-cut answers. I do not myself believe that the defendant would have been entitled to litigate the issue of its culpable conduct to the bitter end of the last case if the next several trials resulted in adverse verdicts.

But for the reasons set forth above, I believe that the single jury determination in *Food Pageant* is an inadequate basis under the totality of circumstances presented for a decision that precludes this defendant from relitigating the culpability of its conduct in the several hundred outstanding lawsuits. The obvious practical advantages inherent in the Court's determination, which I in no way mean to minimize, seem to me far outweighed by the palpable unfairness of the result reached.

Accordingly, the order entered in the Supreme Court, Bronx County (Mercorella, J.), on July 22, 1982, which denied plaintiffs' motion for partial summary judgment precluding Consolidated Edison from relitigating the issue of its gross negligence, should be affirmed.

Order filed.

Order of the Appellate Division, First Judicial Department, Modifying the Order of the Supreme Court in *Goldstein*

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on May 17, 1983

PRESENT:

HON. THEODORE R. KUPFERMAN,
Justice Presiding.

LEONARD H. SANDLER
JOHN CARRO
SIDNEY H. ASCH
BENTLEY KASSAL,
Justices.

MORRIS GOLDSTEIN and RUTH GOLDSTEIN,
Plaintiffs-Appellants,

—against—

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. and LIND-ROC HOUSING CO., INC.,
Defendants-Respondents,

—and—

WILLIAM KENNEDY, WILLIAM JURITH and PHILLIPS, WOOD, DOLSON, INC.,
Defendants.

An appeal having been taken to this Court by the above-named plaintiffs-appellants from an order of the Supreme Court, Bronx County (Mercorella, J.), entered on July 22,

Order of the Appellate Division, First Judicial Department, Modifying the Order of the Supreme Court in Goldstein

1982, which denied their motion for partial summary judgment,

And said appeal having been argued by Jessel Rothman of counsel for appellants, and by William E. Hegarty of counsel for defendant-respondent Consolidated Edison Company of New York, Inc., and due deliberation having been had thereon, and upon the Opinion of this Court filed herein,

It is ordered that the order so appealed from be and the same is hereby modified, on the law, without costs and without disbursements, to grant so much of plaintiffs' motion as sought to preclude Con Ed from relitigating the gross negligence issue, and otherwise affirmed, and the matter remanded for a trial on the remaining issues including causation and comparative negligence. [Sandler, J., dissents in an Opinion.]

ENTER:

JOSEPH J. LUCCHI
Clerk

Order of the Appellate Division, First Judicial Department, Granting Leave to Appeal in *Goldstein*

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on September 20, 1983.

PRESENT:

HON. THEODORE R. KUPFERMAN,
Justice Presiding.

LEONARD H. SANDLER
JOHN CARRO
SIDNEY H. ASCH
BENTLEY KASSAL,
Justices.

MORRIS GOLDSTEIN and RUTH GOLDSTEIN,

Plaintiffs-Appellants,

—against—

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. and LIND-ROC HOUSING CO., INC.,

Defendants-Respondents,

—and—

WILLIAM KENNEDY, WILLIAM JURITH and PHILLIPS, WOOD, DOLSON, INC.,

Defendants.

The above-named defendant-respondent Consolidated Edison Company of New York, Inc. having moved for leave to

appeal to the Court of Appeals from this Court's order entered on May 17, 1983,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support of said motion and the papers filed in opposition or in relation thereto; and due deliberation having been had thereon,

It is ordered that the motion be and the same hereby is granted and this Court, pursuant to CPLR 5713, certifies that the following question of law, decisive of the correctness of its determination, has arisen, which in its opinion ought to be reviewed by the Court of Appeals:

> "Was the order of this Court, which modified the order of the Supreme Court, properly made?"

This Court further certifies that its determination was made as a matter of law and not in the exercise of discretion.

ENTER:

/s/ JOSEPH J. LUCCHI
Clerk

Memorandum Decision of the New York Supreme Court Granting Partial Summary Judgment in *Gillman*

SUPREME COURT
NEW YORK COUNTY SPECIAL TERM PART I

SEYMOUR GILLMAN, Trustee in Bankruptcy for SHERRY TOBACCO COMPANY, INC., and CLAREMONT-MADISON TOBACCO CORP.,

Plaintiffs,

—against—

CONSOLIDATED EDISON CO. OF NEW YORK, INC.,

Defendant.

KLEIN, ALVIN F., *J.*:

Plaintiffs move for an order granting them partial summary judgment against the defendant as to defendant's gross negligence and for an assessment of the plaintiffs' damages occasioned as a result thereof.

This action arises from the New York City Blackout of 1977. The corporate plaintiffs were wholesale distributors of cigarettes, tobacco and related products at 2040 Harrison Avenue, Bronx, New York City. The complaint alleges that as a result of the defendant's negligence, gross negligence and reckless and wilful misconduct, which resulted in the aforesaid blackout, the plaintiffs were the subjects of looting and vandalism of its property and assets. The complaint further alleges that the damages and losses suffered by plaintiffs were the direct result of the defendant's negligence and gross negligence.

This motion by plaintiffs for partial summary judgment is founded upon the doctrine of collateral estoppel, based upon a

prior determination in another lawsuit arising from the 1977 power failure. Plaintiffs rely on the case of Food Pageant, Inc. v. Consolidated Edison Co. (54 NY2d 167). In that case the Court of Appeals let stand a jury finding that defendant Consolidated Edison had been grossly negligent and that such negligence was the proximate cause of plaintiff's damages, as to food spoilage.

Plaintiffs contend herein that the Food Pageant determination as to defendant's gross negligence under the doctrine of collateral estoppel is conclusive and binding on defendant and that plaintiffs should be awarded summary judgment and an assessment of damages.

It is the law in New York that there are "two necessary requirements for the invocation of the doctrine of collateral estoppel. There must be an identity of issue which has necessarily been decided in the prior action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling" (Schwartz v. Public Administrator, 24 NY2d 65, 71). Moreover, the doctrine may be used in an offensive fashion by a plaintiff against a defendant to avoid relitigation of an issue already determined in a prior action to which the defendant was a party (see Read v. Sacco, 49 AD2d 471).

It is evident that Consolidated Edison had a full and fair opportunity to litigate and contest the issue of its gross negligence in the Food Pageant case at trial and all the way through the appeals process. Also, there exists an identity of issue, namely, gross negligence, between the instant action and the Food Pageant case. That issue is decisive in this case. Hence, plaintiffs are entitled to partial summary judgment as to the issue of defendant's gross negligence.

In order to be entitled to recover damages, it is the plaintiff's burden to show that defendant's gross negligence was a substantial causative factor in the sequence of events that led to plaintiff's damages. The fact that the "instrumentality" which caused the damage was the criminal conduct of third persons does not necessarily preclude a finding of "proximate cause" if

the intervening agency was itself a foreseeable consequence of the situation created by defendant's conduct (Derdiarian v. Felix Constr. Co., 51 NY2d 308: Nallan v. Helmsley-Spear, Inc., 50 NY2d 507).

> If the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act which breaks the causal nexus (see, e.g. Martinez v. Lazaroff, 48 NY2d 819, 820; Ventricelli v. Kinney System Rent A Car. 45 NY2d 950, 952, supra; Rivera v. City of New York, 11 NY2d 856). Because questions concerning what is foreseeable and what is normal may be the subject of varying inferences, as is the quesiton of negligence itself, these issues generally are for the fact finder to resolve.

(Derdiarian v. Felix Constr. Co., supra, p. 315.)

Plaintiffs' motion for an assessment of damages is denied because the issue of causation must still be resolved at trial.

Defendant cross-moves for an order pursuant to CPLR 3212 directing the entry of summary judgment in favor of defendant and against plaintiff dismissing the complaint on the ground that the alleged damages of which plaintiff complains resulted from a superseding cause as a matter of law, or, in the alternative, an order pursuant to CPLR 3212 directing the entry of partial summary judgment in favor of defendant and against plaintiff dismissing all counts of the complaint asserted on behalf of Claremont Tobacco Corp. on the ground that Consolidated Edison cannot be held liable for the losses, if any, sustained by one who was not its customer at the time as a matter of law.

The cross-motion in chief is denied for the reasons already discussed with respect to the motion. The alternative request for relief is also denied[;] it appearing from the proofs submitted (Exhibit A to plaintiffs' affirmation in opposition to cross-motion) that Claremont was, in fact, defendant's customer at the time of the incident.

Memorandum Decision of the New York Supreme Court Granting Partial Summary Judgment in Gillman

The part of the cross-motion for an order pursuant to CPLR 3025(b) granting defendant leave to amend its answer is granted (Sheldon Electric Co. v. Oriental Blvd. Corp., 56 AD2d 886; Albany Crane Service v. Pettibone Mulliken Corp., 54 AD2d 794) except that the Second Affirmative Defense contained in the proposed amended answer shall be omitted since this Court has already determined that it has no merit.

Settle order.

/s/ A. F. K.
J. S. C.

Dated: July 8th, 1982

Order of the New York Supreme Court Entering Partial Summary Judgment in *Gillman*

At a Special Term Part 1 of the Supreme Court held in and for the County of New York at 60 Centre Street Borough of Manhattan, on the 24 day of August, 1982

Index No. 16458/78

PRESENT:

HON. ALVIN F. KLEIN,

Justice.

SEYMOUR GILLMAN, Trustee in Bankruptcy for SHERRY TOBACCO COMPANY, INC., and CLAREMONT-MADISON TOBACCO CORP.,

Plaintiffs,

—against—

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendant.

ORDER

Plaintiff, by his attorney, Irving Schneider, having duly moved (1) for an order granting plaintiff partial summary judgment on the issue of defendant's culpability for gross negligence, on the ground that, under the doctrine of collateral estoppel, a prior determination in another lawsuit (*Food Pageant, Inc.* v. *Consolidated Edison Co., Inc.*, Index No. 16971/77 (Sup. Ct. Bronx Co.)) that the July 13-14, 1977 electric power failure and blackout in the New York City metropolitan area resulted from the gross negligence of the defendant Consolidated Edison Company of New York, Inc.

("Con Edison") is conclusive and binding on defendant in this action, and (2) for an assessment of plaintiff's damages, and defendant Con Edison, by its attorneys Ernest J. Williams and Cahill Gordon & Reindel, having duly cross-moved (1) for an order granting defendant summary judgment dismissing the complaint on the ground that the damages alleged in the complaint were not proximately caused by Con Edison as a matter of law, or in the alternative, (2) for an order granting defendant summary judgment dismissing the claims asserted by plaintiff on behalf of Claremont-Madison Tobacco Corp. ("Claremont") on the ground that defendant owed Claremont no duty to provide continuous electrical service as a matter of law, and (3) for an order granting defendant leave to amend its answer and permitting it to serve upon plaintiff the proposed Amended Answer submitted with defendant's motion papers; and said motion and cross-motion having regularly come on to be heard.

NOW, upon reading and filing plaintiff's Notice of Motion, dated March 22, 1982; the affidavit of Seymour Gillman, sworn to on March 15, 1982, and the affirmations of Irving Schneider, dated March 17, 1982 and April 14, 1982, and the exhibits annexed thereto; defendant's Notice of Cross-Motion, dated April 13, 1982; the affidavit of William E. Hegarty, sworn to on April 2, 1982, and the exhibits annexed thereto; the affidavit of Ernest J. Williams, sworn to on April 19, 1982, and the exhibits annexed thereto; and the affidavits of Thomas J. Kavaler, sworn to on April 28, 1982, June 15, 1982 and June 21, 1982, and the exhibits annexed thereto; and upon all the proceedings heretofore had herein; and due deliberation having been had and a written memorandum decision of this court having been filed with the clerk of the court on July 8, 1982;

NOW, on motion of Cahill Gordon & Reindel, of counsel to Ernest J. Williams, attorney for defendant Con Edison, it is

ORDERED, that plaintiff's motion for partial summary judgment on the issue of defendant's culpability for gross negligence is granted, and it is further

Order of the New York Supreme Court Entering Partial Summary Judgment in Gillman

ORDERED, that plaintiff's motion for an assessment of damages is denied, and it is further

ORDERED, that defendant's cross-motion for summary judgment dismissing the complaint is denied, and it is further

ORDERED, that defendant's alternative cross-motion for partial summary judgment dismissing the claims asserted on behalf of Claremont is denied, and it is further

ORDERED, that defendant's cross-motion for leave to amend its answer and to serve upon plaintiff the proposed amended answer submitted with defendant's motion papers is granted except that the second affirmative defense contained in the proposed amended answer shall be omitted.

ENTER:

/s/ A. F. K.
J. S. C.

FILED
Aug 26, 1982
Co. Clerk's Office
New York

Order of the New York Supreme Court Denying Motion for Reargument in *Gillman*

SUPREME COURT OF THE STATE OF NEW YORK
SPECIAL TERM PART 1
NEW YORK COUNTY
at the Courthouse thereof, 60 Centre Street,
New York, New York, 10007.

Index No. 16458/78

PRESENT:

HON. ALVIN KLEIN,

Justice.

SEYMOUR GILLMAN, Trustee in Bankruptcy for SHERRY TOBACCO COMPANY, INC., and CLAREMONT-MADISON TOBACCO CORP.,

Plaintiffs,

—against—

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendant.

ORDER

Upon the foregoing papers this motion for an order granting defendant leave to reargue plaintiff's motion for partial summary judgment is denied.

Movant has failed to demonstrate that the Court overlooked or misapprehended any relevant facts or controlling principle of law in arriving at its original decision.

Dated: August 24, 1982

/s/ A. F. K.
J. S. C.

FILED
Aug 26, 1982
Co. Clerk's Office
New York

Order of the Appellate Division, First Judicial Department, Affirming the Order of the Supreme Court, Entering Partial Summary Judgment in *Gillman*

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 30, 1983

PRESENT:

HON. THEODORE R. KUPFERMAN,
Justice Presiding,
SAMUEL J. SILVERMAN
MAX BLOOM
FRITZ W. ALEXANDER, II,
Justices.

SEYMOUR GILLMAN, Trustee in Bankruptcy for SHERRY TOBACCO COMPANY, INC. and CLAREMONT-MADISON TOBACCO CORP.,
Plaintiff-Respondent,

—against—

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from an order of the Supreme Court, New York County (Alvin F. Klein, J.), entered on August 29, 1982, which *inter alia*, granted plaintiff's motion for partial summary judgment on the issue of defendant's culpability for gross negligence and denied defendant's cross-motion for summary judgment dismissing the complaint,

Order of the Appellate Division, First Judicial Department, Affirming the Order of the Supreme Court, Entering Partial Summary Judgment in Gillman

And said appeal having been argued by William E. Hegarty of counsel for appellant, and by Jane Compton Hammett of counsel for respondent; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed, without costs and without disbursements.

ENTER:

/s/ JOSEPH J. LUCCHI
Clerk.

Order of the Appellate Division, First Judicial Department, Granting Leave to Appeal in *Gillman*

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on September 20, 1983.

PRESENT:

HON. THEODORE R. KUPFERMAN,
Justice Presiding,
SAMUEL J. SILVERMAN
MAX BLOOM
FRITZ W. ALEXANDER, II,
Justices.

SEYMOUR GILLMAN, Trustee in Bankruptcy for SHERRY TOBACCO COMPANY, INC. and CLAREMONT-MADISON TOBACCO CORP.,
Plaintiff-Respondent,

—against—

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Defendant-Appellant.

The above-named defendant-appellant having moved for leave to appeal to the Court of Appeals from the order of this Court entered on June 30, 1982,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support of said motion and the papers filed in opposition or in relation thereto; and due deliberation having been had thereon,

Order of the Appellate Division, First Judicial Department, Granting Leave to Appeal in Gillman

It is ordered that the motion be and the same hereby is granted and this Court, pursuant to CPLR 5713, certifies that the following question of law, decisive of the correctness of its determination, has arisen, which in its opinion ought to be reviewed by the Court of Appeals:

> "Was the order of the Supreme Court, as affirmed by this Court, properly made?"

This Court further certifies that its determination was made as a matter of law and not in the exercise of discretion.

ENTER:

JOSEPH J. LUCCHI
Clerk.

Order of the Court of Appeals of the State of New York Denying Reargument in *Gillman*

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixth day of September A.D. 1984

PRESENT,

HON. LAWRENCE H. COOKE,
Chief Judge, presiding.

1 Mo. No. 791

EDWARD I. KOCH, as Mayor of the City of New York, et al.,
Respondents-Appellants,

vs.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Appellant-Respondent.

SEYMOUR GILLMAN, Trustee & c.,
Respondent,

vs.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Appellant.

Order of the Court of Appeals of the State of New York Denying Reargument in Gillman

A motion for reargument in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

/s/ DONALD M. SHERAW

Donald M. Sheraw
Clerk of the Court

Office - Supreme Court, U.S.
FILED
DEC 14 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-757

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Petitioner,

—against—

EDWARD I. KOCH, as Mayor of the City of New York, et al,

Respondents,

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Petitioner,

—against—

MORRIS GOLDSTEIN and RUTH GOLDSTEIN,

Respondents,

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Petitioner,

—against—

SEYMOUR GILLMAN, Trustee in Bankruptcy for SHERRY TOBACCO COMPANY, INC., et al,

Respondents.

RESPONDENTS, MORRIS AND RUTH GOLDSTEINS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

JESSEL ROTHMAN
Counsel for Respondents Goldstein
170 Old Country Road
Mineola, New York 11501
(516) 294-9449

Of Counsel: Lisa J. Rinaldi

December 10, 1984

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No. 84-757

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Petitioner,

—against—

EDWARD I. KOCH, as Mayor of the City of New York, et al.,

Respondents.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Petitioner,

—against—

MORRIS GOLDSTEIN and RUTH GOLDSTEIN,

Respondents.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Petitioner,

—against—

SEYMOUR GILLMAN, Trustee in Bankruptcy for SHERRY TOBACCO COMPANY, INC., et al.,

Respondents.

RESPONDENTS, MORRIS AND RUTH GOLDSTEINS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT OF THE CASE

Morris Goldstein was injured on July 14, 1977 while ascending a pitch black windowless staircase at 2410 Barker Avenue, Bronx, New York. The proximate cause of the accident was that the stairs, which were statutorily mandated to be illuminated, were pitch black because of the gross negligence of CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., (hereinafter referred to as "Con Ed") in operating and maintaining its electric transmission lines (hereinafter referred to as "the 1977 Blackout"). Con Ed's gross negligence resulted in causing a cessation of electrical service in the entire New York area allegedly resulting in more than 300 valid law suits for alleged damages in excess of $130,000,000.00[1].

Prior to the trial of the action of Morris Goldstein and Ruth Goldstein (hereinafter referred to as "Respondents") against Con Ed in the Supreme Court of the State of New York, Bronx County, the Respondents moved for partial summary judgment on the issue of Con Ed's gross negligence in causing the cessation of electrical service pursuant to the doctrine of collateral estoppel.

The basis of the motion for partial summary judgment was a decision by a jury (reduced to judgment) in a court of record of competent and comparable jurisdiction, to wit, the Supreme Court of the State of New York, Bronx County, that Con Ed's gross negligence caused the 1977 Blackout. *Food Pageant, Inc. v. Consolidated Edison Company, Inc.*, 54 N.Y.2d 167 (1981). That jury verdict and the attendant judgment was sustained on all issues of law by the highest Court of the State of New York, the New York State Court of Appeals. *See, Food Pageant, Inc. v. Consolidated Edison Company, Inc., supra.*

---

[1]Petitioner's figures, not Respondent's.

The Respondents' motion for partial summary judgment was denied by the lower court. The Respondents appealed the denial to the Supreme Court, State of New York, Appellate Division, First Department, which reversed the lower court and held that the doctrine of collateral estoppel applied, and Con Ed was precluded from relitigating the determination that the 1977 Blackout was caused by Con Edison's gross negligence. However, Con Ed was not precluded from litigating two questions: (1) whether or not the 1977 Blackout was the proximate cause of Mr. Goldstein's fall; and (2) whether there was privity of contract between Mr. Goldstein and Con Ed. *Goldstein v. Consolidated Edison of New York, Inc.*, 93 A.D.2d 589.

Con Ed appealed that holding to the New York State Court of Appeals.

The *Goldstein* appeal was decided simultaneously with two appeals then pending, to wit: *Edward I. Koch, as Mayor of the City of New York, et al, v. Consolidated Edison Company of New York, Inc.*, and *Seymour Gillman, Trustee in Bankruptcy for Sherry Tobacco Company, Inc., et al, v. Consolidated Edison Company of New York, Inc.*. All three appeals were heard simultaneously and a decision in favor of *Koch, Goldstein* and *Gillman* was encompassed by the opinion written by the Court of Appeals in *Koch*, 62 N.Y.2d 548.

In the opposition to the motion for summary judgment in *Goldstein, supra,* and in support of its appeals both in the Appellate Division of the Supreme Court of the State of New York and the New York State Court of Appeals, (*Goldstein, supra,* 62 N.Y.2d 936) Petitioner raised primarily the same issues it appears to raise in the application to this Court, to wit; that the application, in cases arising out of the 1977 Blackout, of the offensive use of the doctrine of collateral estoppel is unfair because: (1) in the trial relied on by Respondents, to wit, *Food Pageant, Inc. v. Con-*

solidated Edison Company, Inc., Con Ed did not introduce or attempt to introduce evidence of physical, political and financial restraints which influenced the system's reliability because of a remark made by the trial judge when trial counsel for Con Ed opened to the jury[2]; and (2) in the Small Claims Court of the Civil Court of the City of New York (courts which are not of record), in five trials, where the plaintiffs were individuals not represented by attorneys and Con Ed was represented by attorneys; Con Ed was able to convince the judges sitting in Small Claims Court that gross negligence had not been proven by the plaintiff in said five instances, and because of this unfairness in the application of the offensive use of the doctrine of collateral estoppel, which doctrine was found constitutional by this court in *Parklane Hosiery vs. Shore*, 439 U.S. 322, 330, in *Goldstein v. Consolidated Edison of New York, Inc.*, the Petitioner, Con Ed, has been deprived of due process under the Fourteenth Amendment to the Constitution of the United States.

---

[2]There is some intimation in *Koch v. Consolidated Edison of New York, Inc.*, 62 N.Y.2d 548, that the New York State Court of Appeals was under the impression that Con Ed did not want to introduce proper evidentiary matters on these issues, but sought to introduce hearsay investigative reports resulting from federal and state investigations of the 1977 Blackout.

SUMMARY OF ARGUMENT

Because the New York State Court of Appeals has held that third-party issue preclusion bars Consolidated Edison of New York, Inc. from relitigating the issue of its gross negligence with regard to the 1977 Blackout, this Court is precluded from re-determining that issue. As a result thereof, the Petition for a Writ of Certiorari must be denied.

In the event the Court elects to determine the Petition on its merit, there is no merit to the Petition for there is no important unresolved constitutional question which was not resolved by this court's decision in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) and *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971).

POINT I

THE UNITED STATES SUPREME COURT IS BARRED FROM REVIEWING THE HOLDING OF THE NEW YORK STATE COURT OF APPEALS THAT THE DOCTRINE OF COLLATERAL ESTOPPEL IS APPLICABLE IN GOLDSTEIN V. CONSOLIDATED EDISON OF NEW YORK, INC.

The Court of Appeals of the State of New York (hereinafter referred to as the "Court of Appeals") having heard all of the arguments proferred by Con Edison before this Court and having determined that the doctrine of collateral estoppel, applied offensively, prohibited Con Ed from relitigating the issue of its gross negligence with regard to the 1977 Blackout in the trial of *Goldstein v. Consolidated Edison of New York, Inc.*, 93 A.D.2d 589, 62 N.Y.2d 936; said determination precludes this Court from redetermining that issue and Con Ed's petition for a writ of certiorari must be denied.

This court's decision in *Brinkerhoff-Faris Trust and Savings Company v. Walter O. Hill*, 281 U.S. 673 (1929), affirms that the contention of the Respondents herein is correct:

> It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this court's power to review decisions of State courts is limited to their decisions on federal questions: and that the mere fact that a State court has rendered an erroneous decision on a question of State law, or has overruled principles or doctrines established by previous decision on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer Appellate jurisdiction on this court.
> *Brinkerhoff, Id.* at pg. 680.

See, also, Allen v. McCurry, 449 U.S. 90, in which this court commented:

> Indeed, though the federal courts may look to the common law or to the policy supporting *res judicata* and collateral estoppel in assessing the preclusive affect of decision of other federal courts, Congress has specifically required all federal courts to give preclusive affect to state court judgments whenever the courts of the state from which the judgments emerged would do so.

Allen v. McCurry, supra, at p. 96.

POINT II

PETITIONER FAILS TO RAISE ANY CONSTITUTIONAL ISSUES TO BE DETERMINED BY THIS COURT.

In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), this Court noted in discussing the potential constitutional bar to the use of the doctrine of collateral estoppel as follows:

> (i) it had already recognized that there was no denial of due process where the defendant had been *given one opportunity to litigate an issue* and that the issue had been fully litigated and the defendant lost, citing *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971);
>
> (ii) There is no constitutional right for the defendant who lost in the first action to be given a second bite at the apple;
>
> (iii) the question of due process was not violated where instead of the defensive use of collateral estoppel, there was an attempt to use collateral estoppel offensively.

The safeguards mandated by the decisions of this court in *Parklane Hosiery Co. v. Shore, supra*, and *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, supra*, are found in *Schwartz v. Public Administrator of the County of Bronx*, 24 N.Y.2d 65, 73 (1969). The Court of Appeals in that case adopted the full and fair opportunity test in applying the doctrine and set forth the operative guideline, to wit, size of claim, extent of litigation, competence and experience of trial counsel, availability of new evidence, indications of a compromise verdict, differences in applicable law, and forseeable or future litigation.

In applying those guidelines, the Court of Appeals held that Con Ed had a full and fair opportunity to litigate the issue of gross negligence in the trial of *Food Pageant, Inc. v. Consolidated*

Edison Company, 54 N.Y. 2d 167 (1981).

Food Pageant, Inc. v. Consolidated Edison Company, supra, was the first trial in which the question of Con Ed's gross negligence arising out of the July 1977 Blackout was heard by a trial court of record. There were nine days of trial from April 27, 1979 to May 9, 1979. Food Pageant, Inc. presented evidence of Con Ed's gross negligence, to wit:

> (a) the Hudson-Farragut tie, a power line which linked Con Edison's system with that of the Public Service and Electric & Gas Company of New Jersey, and the Indian Point II power plant was out of operation;
>
> (b) certain gas turbines for use during the hours of peak power demand were also inoperable at the time of the blackout because of the technicians who manned the turbines were sent home early;
>
> (c) Con Edison failed to maintain properly and inspect certain relays and circuit breakers and failed to secure proper protection against lightning for its towers and transmission lines; and
>
> (d) its employee in charge of Con Edison's system on the evening of July 13, 1977, William Jurith, reacted improperly to the crises in that Mr. Jurith lacked the necessary experience, knowledge and expertise to completely perform the functions of his job.

In response to that evidence, Con Ed introduced evidence that:

> 1) The Hudson-Farragut was out of operation because of the prior failure of a complex piece of machinery;
>
> 2) the Indian Point II power plant was also justifiably out of service for repairs;
>
> 3) the gas turbines were not in operation at the time of the incident because the anticipated period of peak power demand during which the turbines were

normally used had expired earlier in the evening;

4) its inspection program for circuits and relays conformed to the appropriate engineering standards;

5) the lightning protection on the Con Edison towers and lines was adequate and proper; and

6) Mr. Jurith had acted properly and did not in any event act grossly negligently. .

Food Pageant, supra, at 171-172.

As part of its charge, the trial court defined gross negligence, marshalled the evidence the plaintiff had presented in that case and instructed the jury that in order to find Con Ed liable, it had to find that the plaintiff proved by a fair preponderance of the credible evidence that Con Ed was grossly negligent. (r-139-144[3]) A six-member jury unanimously answered the specific question on that point in the affirmative. The Court of Appeals found no error in the presentation of the case to the jury, and, by implication, no impropriety in the court's instruction on the law including the legal definition of gross negligence. *Food Pageant, supra.*

As set forth above, Con Ed's position is that the Court of Appeals misapplied the doctrines enunciated by *Schwartz v. Public Administrator of Bronx County, supra,* in two respects: (1) that in *Food Pageant, Inc.,* it was precluded from introducing probative evidence exculpating Con Ed from gross negligence; and (2) the court refused to hold that Small Claims Court judgments constitute judicial findings which would bar the application of the doctrine of collateral estoppel and that refusal was improper.

Both contentions by Con Ed are without merit.

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[3]*Goldstein vs. Consolidated Edison of New York, Inc.,* 93 A.D.2d 589, Record on Appeal, Appellate Division, First Department.

Con Ed's first contention is in effect addressed to the issue of whether Con Ed had a full and fair opportunity to litigate the issue of gross negligence during the *Food Pageant, Inc. v. Consolidated Edison of New York, Inc., supra,* trial. In order to determine if Con Edison's contention has any merit, one must go outside the record before the court(s) in *Goldstein.*

In *Goldstein, supra,* neither in the motion before the lower court, nor in the record presented to the Appellate Division, First Department, nor in the record presented to the Court of Appeals, is there any intimation that Con Ed was precluded from offering evidence in *Food Pageant, Inc. v. Consolidated Edison of New York, Inc., supra,* that physical, political and financial restraints were the cause of Con Ed's gross negligence and excused Con Edison from any liability for its conduct.

The first inkling of this argument by Con Ed was found in the brief Con Ed submitted to the Court of Appeals in the joint appeal *Koch v. Consolidated Edison of New York, Inc., Goldstein v. Consolidated Edison of New York, Inc.* On page 6 of Con Ed's brief the following appears[4]:

> MR. ROCK: [Counsel for Con Edison]: I think you'll see also as this trial progresses that Con Edison is a unique utility. There are certain substantial *physical, political and financial restraints* which influence the system of reliability of Con Edison. *Among these, and you'll be hearing about them, are the failure of the City of New York to allow Con Edison to build plants in the city* ——
>
> MR. LEWIS: [Counsel for Food Pageant, Inc.]: Your Honor, I'm going to object. The City isn't a defendant.

---

[4]Brief of Defendant-Appellant Consolidated Edison Company of New York, Inc. in the Court of Appeals of the State of New York. *Goldstein v. Consolidated Edison Company of New York, Inc.*, 62 N.Y.2d 936.

THE COURT: Sustained.

MR. ROCK: Well, we'll be showing this, your Honor, and we intend to prove this; that the failure to--

MR. LEWIS: Objection your Honor--

MR. ROCK: -- grant permission --

THE COURT: Just a minute. The issue is going to be whether Con Ed was negligent or grossly negligent, whichever the situation is. What has that got to do with whatever contracts you may have with --

MR. ROCK: I'm not talking about contracts, your Honor, what I'm saying is that the Con Ed system, in its uniqueness, has been impinged upon by the failure of the City of the New York to allow Con Edison to build plants here in the City.

***

MR. LEWIS: Objection, Your Honor.

THE COURT: Sustained. You just tell the jury what *you did or what you didn't do, that's what's proper. You tell the jury how Con Edison was not grossly negligent.*

Trial Transcript at pp. 34-36. (Emphasis supplied.)

Respondent unequivocally asserts to this court that during the *Food Pageant, Inc. v. Consolidated Edison of New York, Inc., supra,* trial, Con Ed did not present evidence, proffer evidence or proffer the admission into evidence of the investigative reports which in any manner related to physical, political and financial restraints which were probative of the issue of Con Ed's gross negligence even though all of that evidence was available to Con Ed during the *Food Pageant, Inc. v. Consolidated Edison of New York, Inc., supra,* trial.

As proof of Respondent's contention that there is no basis for counsel of record for Petitioner to state to this court that there was

such evidence proferred and said proffer was denied. Respondent calls this court's attention to a decision by the Appellate Division, Second Department, State of New York in *Shaid v. Consolidated Edison of New York, Inc.*, 95 A.D.2d 610, (2d Dept. 1983) in which Petitioner raised this issue.

In the majority opinion, the Appellate Division stated as follows:

> As to the extrinsically suspect nature of the *Food Pageant* decision, Con Ed argues, dehors the record, that exculpatory material in the "authorative" reports (e.g., its inability to raise new capital for systems improvements) was ruled inadmissible during the *Food Pageant* trial. Again, of course, this alleged error was cognizable upon appeal and, not having been pressed on direct appeal from the judgment, is entirely unpersuasive in what would amount to collateral review here. *Nor would the hearsay conclusion of these reports, no matter how "authorative", be competent as evidence, whether newly discovered or otherwise.*
>
> *Shaid v. Consolidated Edison, supra,* at 615. (Emphasis supplied).

The concurring opinion in *Shaid, supra,* expanded on the opinion and stated:

> I now turn my attention to the contention that Con Edison has *New evidence* which was not presented in the *Food Pageant* case.
>
> It is true that the discovery of significant new evidence after a judicial determination may make collateral estoppel inappropriate. *Vincent V. Thompson,* 50 A.D.2d 211, 221, *supra.* Defendant contends that certain investigative reports which were not before the jury in *Food Pageant, supra,* strongly suggest that it was not grossly negligent. However, these reports were not newly discovered. In fact, they were all in existence by early 1978 and were a part of the evidence in the case

> of *Lee v. Consolidated Edison Company*, 95 Misc.2d 120, *rev'd* 98 Misc.2d 304, which was decided on June 1, 1978. The *Food Pageant* case was tried from April 27, to May 9, 1979.
>
> It is contended that Con Edison was prevented from presenting these reports during the *Food Pageant* trial. *However, defendant has not shown this court any portion of the record of that trial which indicates that it offered any of these reports into evidence or even mentioned them to the Trial Judge.* Significantly, the Court of Appeals in its decision in *Food Pageant*, 54 N.Y.2d 167, *supra*, did not mention any appellate issue concerning these reports.
>
> It is, at least, arguable that important evidence which is improperly excluded in a prior case militates against estoppel attaching to issues in that case, even where the judgment therein was not appealed. However, where the evidence in question was possessed by the opponent of issue preclusion at the time of the prior case, and no attempt was made to have that evidence admitted, it makes no sense at all to say that the party, in this case Con Ed, was thereby not afforded a full and fair opportunity to litigate. Moreover, the policies of promoting fairness for all parties and of promotion judicial efficiency are hardly furthered by encouraging litigants to keep some evidence from the fact-finder in the case so that, if there is an adverse verdict, this "new" evidence can magically appear to prevent collateral estoppel.
>
> *Shaid v. Consolidated Edison Company*, *supra*, at 625-626. (Emphasis supplied.)

Thus, it is clear that there is no basis in fact or in law for the Petitioner to assert to this court that it was prevented from offering any evidence which would have established Con Ed's freedom from gross negligence. Con Ed has no basis in fact or in law to assert to this court that it is precluded from alleging that it was not given a full and fair opportunity to try the issue of gross negligence in the trial of *Food Pageant, Inc. v. Consolidated Edison of New York, Inc.*

The second contention of Con Ed raised by its Petition is that a Small Claims Court judgment is a judicial finding or determination of the type contemplated by *Schwartz v. Public Administrator, supra; B.R. DeWitt,* 19 N.Y.2d 141 (1967) and *State Farm v. Century Home Components,* 275 Or. 97, 55 P. 2d 1185 (1976) which would bar the application of the offensive use of the doctrine of collateral estoppel.

All of the cases cited in the Petition are Small Claims Court cases although some were reviewed by an Appellate Court. The proceedings before a Small Claims Court are informal in which simplified procedures are applied. It is not a court of record.

The Court of Appeals thought so little of Con Ed's argument that it discounted it in approximately ten to twelve lines of its lengthy opinion in *Koch v. Consolidated Edison of New York, Inc.*

> It is first contended that third-party issue preclusion should not apply because there are other judicial determinations concluding that Con Edison was not guilty of gross negligence in connection with the blackout. Whatever might be said of the effect properly to be given to inconsistent determinations of like judicial stature, in this instance *it suffices to dismiss Con Edison's contention to observe that the inconsistent determinations on which it would rely are those in cases tried in Small Claims Part of the Civil Court of New York City as to which informal and simplified procedures are applicable and which by express statutory provision are not to be deemed an adjudication of any fact at issue* (other than the amount involved) with respect to any other action. [Footnotes omitted.] *Koch v. Consolidated Edison of New York, Inc.*, 62 N.Y.2d 548. (Emphasis supplied.)

A more in depth view of why Small Claims Court judgments should not be considered judicial determinations is found in the

majority opinion of the Appellate Division, Second Department, State of New York in *Shaid v. Consolidated Edison, supra:*

> Defendant's [Con Ed] primary argument in opposition to issue preclusion, ... is that applying collateral estoppel would be unfair because there exist several previous judgments in cases stemming from the black-out which are in its favor. *As a general proposition, there does seem to be "something fundamentally offensive about depriving a party of the opportunity to litigate the issue again when he has shown beyond a doubt that on another day he prevailed"* (citations omitted). *If, in one case, the fact finder holds, for example, that a defendant was not negligent and then, in a subsequent case, involving another plaintiff,* the fact finder concludes that the defendant was negligent, why then, other things being equal, should the courts give more credence to the latter verdict so as to estop further litigation of the negligence issue?
>
> While not quarrelling with the general proposition, I do not believe it applies here. The fact is other things are not equal and there is every reason to give more credence to the *Food Pageant* verdict than to other cases in which Con Ed emerged the victor. *Each one of these other cases was a small claims action.* The two reported cases, *Lee v. Consolidated Edison Co.* (95 Misc.2d 120, *supra*) and *Lo Vico v. Consolidated Edison Co.*, (99 Misc.2d 897), reveal that the plaintiffs were *pro se*, although *amicus curiae* briefs were filed, apparently, with respect to certain legal issues. On the other side, Con Ed was represented by the same law firm appearing in this case. In *Food Pageant, (supra)* the plaintiff was represented by counsel. A victory against an opponent who lacks expert legal advice, particularly with respect to the presentation of key evidence which it is his burden to present, is not very noteworthy, whatever the forum. One can only wonder whether the plaintiffs in the small claims actions referred to by Con Ed were capable of presenting evidence of any quality or quantity on a subject as complex as the degree of Con Ed's responsibility for the blackout.

The fact that these other determinations were in small claims court is fatal to defendant's argument. "By statute collateral estoppel effect is denied to *** determinations in small claims actions. [Citations omitted.] Even in the absence of statute, however, these minor suits are illustrative of the type of determination which, under accepted common-law principles, should not be held conclusive in later cases (see, e.g., Restatement, Judgments 2d [Tent Draft No. 4], §68.1, sud. [c], and Comment d)" (*Gilberg v. Barbieri*, 52 N.Y.2d 285, 293, *supra*). If small claims determinations are so lightly regarded as not to be accorded collateral estoppel effect, why then should they be accorded the equivalent status and respect given a contrary determination of the Supreme Court, which has been appealed to the highest court in the State, so as to prevent the latter from serving as a given collateral estoppel effect because, among other things, we are reasonably certain of its correctness. Such certainty is not dispelled because the opponent of issue preclusion can point to a contrary determination of such questionable value that, as a matter of law, it may not be considered credible enough to bind a party in a subsequent action.

The dissent maintains that it is unfair to let '[a] plaintiff with a substantial *** to sit back and wait for a smaller case to proceed with the expectation that the defendant prevailing in the small case can be ignored because the plaintiff with the lesser claim lacked the ability to try the case to the fullest, yet if the defendant loses, collateral estoppel will apply because of the defendant's knowledge of the pendency of the larger claim.' That would be unfair and is, perhaps, one of the reasons that collateral estoppel is, in fact, not applied in small claims actions. If defendant had lost in the small claims actions it refers to, it would still have had the right to litigate the issue of gross negligence in the subsequent *Food Pageant* case.

The dissent's unfairness argument can be refuted by examining the alternative. It would be very unfair to allow a defendant, such as Con Ed in this case, to forever avoid the possibility of collateral estoppel in a

> multiple case situation just because it was able to win one or two minor cases in the small claims court which, naturally enough, came to trial before any substantial case was heard in the Supreme Court. If defendant's view is accepted, a $50 *pro se* suit by Jane Doe, brought because the plaintiff's meat spoiled during the blackout, which is won by Con Ed because Jane Doe is, of course, no match for the counsel and experts commanded by Con Ed, must lead us to conclude that a subsequent verdict in Supreme Court against Con Ed for many thousands of dollars is of such doubtful validity that it may not result in issue preclusion.
>
> It may be appropriate in another case, wherein some factors are present suggesting that the opponent of issue preclusion lacked a full and fair opportunity to previously litigate the issue in question, that the existence of consistent determinations, as exist here, should be accorded some weight, perhaps even to the extent of tipping the scales against issue preclusion. However, this is not such a case. As already seen, defendant has not, in any respect, persuasively argued that it did not have a full and fair opportunity in the *Food Pageant* case to litigate the question of its responsibility for the blackout.
>
> *Id.* at 626-628. (Emphasis supplied).

Thus, the predicates contained on pages 3 and 4 of the Petition are incorrect and misleading. The true facts reveal that there are no factual predicates upon which Con Ed can base its Petition to this court.

POINT III

THERE ARE NO REASONS FOR GRANTING THIS WRIT.

The reasons stated by Con Ed for granting this writ requires the highest degree of sophistry. For it is based upon the premise that "full" doesn't mean "full" and "fair" doesn't mean "fair" but it means something more than fair, to wit, "fundamental fairness".

This argument is entirely specious. It is respectfully submitted that the Petitioner is incorrect when it states that the Court of Appeals sidestepped the due process issue raised by Con Ed. The Court of Appeals did not.

The Court of Appeals found in *Food Pageant, Inc. v. Consolidated Edison of New York, Inc.*, that Con Ed had a full and fair opportunity during that trial to litigate the question of its gross negligence.

That is the due process standard established by this court. This court held in *Parklane Hosiery Co. v. Shore, supra* that there is no constitutional right for the defendant, who lost in the first action to be given a "second bite of the apple".

What Con Ed contends is that when there are 300 lawsuits arising out of the 1977 Blackout, it should be entitled to more than "one bite". That "fairness" in situations such as multiple claims arising out of the same factual predicate such as a disaster like the 1977 Blackout, requires that Con Ed be entitled to 2, 3, 4, 5, 6 or maybe ten bites at the apple. When counsel for Con Ed was asked the question as to how many bites of the apple his client was entitled to, both in the Appellate Division and the Court of Appeals, he stated he didn't know. Maybe ten was enough, maybe twenty was enough, but it should be more than one.

Respondents' statement as to Con Ed's position on this issue is confirmed by the majority opinions of the Appellate Division, Second Department in *Shaid v. Consolidated Edison of New York, Inc., supra:*

> ...Con Ed fails to suggest a meaningful set of criteria that would clearly distinguish those multiple claimant situations in which offensive use of collateral estoppel has been authorized [citations omitted] from those in which it should not be permitted. *Id.* at 621.
>
> ***
>
> ...resurrection of the mutuality of estoppel rule in a multiple claimant situation where there have been inconsistent results cannot possibly restore public confidence in the integrity of the jury trial system. The possibility of inconsistent results is forever present: it is inherent in the adversarial system. Once the inconsistency appears, it cannot be made to disappear by permitting further litigation of the facts in dispute. The unanalyzed assumption in Currie's railroad illustration is that the *minority* result (in which the defendant lost after a string of 25 victories) is the *aberrational* result—in short, *it* is (or may be perceived to be) the *erroneous* fact-finding. This conclusion is neither logical or wise.
>
> It is intuitively obvious that, of an infinite number of trials of the disputed issue, at least one would be at variance with the rest. A measure of confidence would attach to the conclusion that the minority of one was an erroneous fact finding. Assuming it were possible to take a *statistically valid sample of these trials, a reasonable measure of confidence would attach to the conclusion that if the deviant decisions represented a sufficiently small minority, such would demonstrate that the majority decisions represented the more accurate fact finding. Possibly an inconsequential degree of error would be introduced into this process if, as a cost-cutting measure, the initial trial was video taped and subsequent trials were limited to playing back the tape to different juries. Yet would anyone*

> *seriously suggest that the definition of a fair trial be expanded to incorporate such a process in order to improve its accuracy? Obviously, accuracy has its costs. In a very real sense, litigants are entitled to only that justice which society is prepared to pay for, and that justice is a single fair trial.*
>
> *Id.*, at 618-619. (Emphasis in original). (Footnote omitted).

A most erudite refutation of Con Ed's position is found in a decision of the Supreme Court of Oregon (Hollman, J.) in *State Farm and Fire and Casualty Company, et al. v. Century Home Components*, 275 Or. 97, 550 P.2d at 1189-1190 (1976).

> Once [a] court has concluded that the evidence is sufficient to establish that an identical issue was actually decided in a previous action, *prima facie*, the first judgment should be conclusive. [Citations omitted.] The burden then shifts to the party against whom estoppel is sought to bring to the court's attention circumstances indicating the absence of a full and fair opportunity to contest the issue in the first action or other consideration which would make the application of preclusion unfair. Whether the proferred circumstances and consideration warrant a conclusion that the litigant lacked a 'full and fair' opportunity to litigate the issue and that it would be otherwise unfair to preclude him from contesting the issue again are likewise questions of law. *Collateral estoppel involves a policy judgment balancing the interests of an additional litigant against the interests of the Administration of Justice* and this court reserves the final word as to where the balance is struck in any given case. [Citations omitted].
>
> ***
>
> The 'multiple-claimant anomaly' was first hypothesized by Brainerd Currie as one instance where, absent mutuality, the unrestrained application of collateral estoppel might produce unfair results. Currie,

Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine, 9 Stan. L. Rev. 281 (1957). Currie posed the situation of a train wreck resulting in 50 separate claims being filed against the railroad for negligence. If the defendant railroad won the first 25 cases and subsequently lost the 26th, Currie characterized as an 'absurdity' the notion that the remaining 24 claimants could ride in on the strength of the 26th plaintiff's judgment and estop the defendant on the issue of negligence. The reason was that the 26th judgment would clearly seem to be an aberration. Currie then reasoned that, if we should be unwilling to give preclusive effect to the 26th judgment, we should not afford such effect to an adverse judgment rendered in the *first* action brought because 'we have no warrant for assuming the aberrational judgment will not come as the first in the series'. Currie, *supra*, at 289. Currie thus concluded that, absent mutuality, Collateral Estoppel should not be applied where a defendant potentially faces more than two successive actions. Currie, *supra* at 308.

Those courts which have discarded the rule of mutuality and permit the offensive assertion of Collateral Estoppel have generally rejected Currie's solution to the multiple claimant anomaly in situations where the first judgment is adverse to the defendants, and have precluded a defendant from relitigating multiple claims where it has been concluded that the defendant had, in actuality, the incentive and complete opportunity to contest the issue fully in the first action. Currie's reservations were based on the apprehension that the first judgment might well be an aberration, but this view failed to recognize that the very notion of collateral estoppel demands and assumes a certain confidence in the integrity of the end result of our adjudicative process. There is no foundation either in experience of policy for accepting the suggestion that a decision rendered after a full and fair presentation of the evidence and issues should be considered either substantially suspect or infected with variables indicating the question might be decided differently in another go-round. Currie subsequently conceded the untenability

of his initial position and retreated from it, stating that:

> ...so long as we retain sufficient faith in the institution of trial by jury to retain it for civil cases, at all, what warrant is there for mistrusting the verdict for purposes of collateral estoppel when there is no suggestion that there has been compromise or other impropriety? Currie, *Civil Procedure: The Tempest Brews*, 53 Calif. L. Rev. 25, 36, (1965).

Thus, once it is accepted that the propriety of collateral estoppel is dependent upon the existence of a prior full and fair opportunity to present the case, there seems little reason to limit its application simply because there are multiple claimants in the picture. Although in our adversary system 'there is always a lingering question whether the party might have succeeded in proving his point if he had only been given a second chance at producing evidence [citations omitted], the unsubstantiated and conjectural possibility that a party might receive a favorable judgment somewhere down on the road is an insufficient reason for refusing to apply collateral estoppel. As we stated in *In re Gygi*, 75 Or. Adv. Sh. 3690, 3694, 541 P.2d 1392, 1395 (1975),

> "***the prior judgment is treated as conclusive, not because it is actually conclusive evidence of the ultimate truth as to those issues necessarily determined, but because of the public interest in the finality of judgments and in the efficient administration of justice.***"

The deference we lend prior adjudications is based on our reasonable confidence as to their correctness rather than a conviction of their unassailable truth. One of the purposes of the doctrine is to protect the authority of judicial decisions and this purpose would obviously be ill-served by refusing to give effect to a prior determination on the hypothetical possibility of a contrary decision if the case were continuously retried. [Citations omitted.] *State Farm Fire and*

Casualty Company, et al v. Century Home Components, 275 Or. 97, 550 P. 2d at 1189-1190 (1976). (Emphasis supplied.)

There is no fundamental unfairness in applying the doctrine of issue preclusion based upon the result of the first trial in a court of record for, it is respectfully submitted, if the offensive use of the doctrine of collateral estoppel is not applied after the first trial it cannot be applied at all.

This is not unfair to Con Ed because simply determining that Con Ed was grossly negligent in causing the 1977 Blackout does not establish a *res ipsa* case for the respondent. The Court of Appeals in *Goldstein, supra,* mandated that there be a trial on proximate cause. Con Ed has asserted that where the plaintiff is not a user of its electric service by paying for the service directly to Con Ed there is no privity of contract, therefore, no duty either in negligence or in contract. The Appellate Division, Second Department of the State of New York has upheld Con Ed's position and vacated judgments obtained against Con Ed by tenants of apartment house who were injured in public hallways maintained by the landlord. *See, Strauss v. Belle Realty Co.*, 98 A.D.2d 424, 469 N.YS.2d 948 (2d Dept., 1983).

In weighing the rights of Con Ed against the public's interest in the finality of judgments and the efficient administration of judgment, Con Ed's contention that it is entitled to not only "fairness" but "fundamental fairness", in light of all the circumstances, must fall.

The conjectural possibility that a party might receive a favorable judgment somewhere down the road is an insufficient reason for refusing to apply the offensive use of the doctrine of collateral estoppel.

CONCLUSION

The writ of certiorari should not issue.

Respectfully submitted,

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(3)

No. 84-757

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Petitioner,

-against-

EDWARD I. KOCH, as Mayor of the City of New York, et al.,

Respondents.

On Petition For A Writ of Certiorari
To The Court of Appeals
Of The State of New York

RESPONDENTS' BRIEF IN OPPOSITION

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January 17, 1985.

QUESTION PRESENTED*

Was the application of offensive collateral estoppel — a matter ordinarily within the "broad discretion" of the trial courts Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979) — so fundamentally unfair as to constitute a denial of due process because the dispositions of the Small Claims Court cases brought by plaintiffs pro se were inconsistent with the judgment after plenary trial in New York's highest trial court, upon which the estoppel was based?

*Parties to the proceeding in the court below, in addition to petitioner, are respondents as follows: Edward I. Koch, as Mayor of the City of New York, The City of New York, New York City Health and Hospitals Corporation, New York City Off Track Betting Corporation, Board of Education of the City of New York, Board of Higher Education, City University of New York, New York City Housing Authority, Triborough Bridge and Tunnel Authority, New York City Transit Authority, Manhattan and Bronx Surface Transit Operating Authority, Staten Island Rapid Transit Authority, Metropolitan Transportation Authority, The Long Island Railroad Company, Metropolitan Suburban Bus Authority, and Consolidated Rail Corporation.

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REASONS FOR DENIAL OF THE WRIT

The low quality of the small claims dispositions

Petitioner's argument of unfairness in the application of offensive collateral estoppel when the underlying finding "is contradicted by a number of findings in the defendant's favor," ignores the relative quality of the findings involved. Indisputably, a prior inconsistent judgment is a factor to be considered in the determination of the applicability of offensive collateral estoppel, and it may dictate inapplicability, as this Court has indicated, where a prior losing defendant had little incentive to defend vigorously or lacked procedural opportunities which, had they been available, could readily have caused a different result. Parklane Hosiery Inc. v. Shore, 439 U.S. 322, 330-331. But the same elements which would render insignificant a present defendant's prior defeat should also apply to its prior victory over a plaintiff insufficiently motivated or equipped to prosecute vigorously.

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The petition tells the Court nothing of such matters in the inconsistent cases, except for what would be gleaned only from an actual reading of the memoranda to which the Court is referred (Pet., p. 4), i.e., that plaintiffs therein were lay persons in Small Claims Part appearing pro se, under the burden of establishing gross negligence in a specialized and technical activity such as the transmission of electricity to the New York City metropolitan area, and relying entirely upon reports, including one of petitioner's investigation of its own conduct, which would not be admitted into evidence under normal rules.

There is no suggestion that the evidentiary records in those cases were substantially similar to that in Food Pageant, Inc., v. Consolidated Edison Co., Inc., 54 NY2d 167, 429 N.E.2d 738 (1981), the New York Supreme Court action which held petitioner grossly negligent and by the judgment in which it has here been collaterally estopped. As the record in this case reveals, the Food Pageant trial "lasted nine days, with approximately 1300 pages of

testimony being taken." Among the witnesses were seven of defendant's employees, at least three of whom were called by plaintiff. Cf. Carr v. District of Columbia, 646 F2d 599, 606-607 (D.C. Cir., 1980, applying offensive collateral estoppel despite a prior inconsistent judgment based upon an "incomplete record" made at a time when the search for evidence was not yet completed).

As the New York Court of Appeals put it, referring to petitioner's cited cases, they were "tried in Small Claims Part of the Civil Court of New York City as to which informal and simplified procedures are applicable and which by express statutory provision are not to be deemed an adjudication of any fact at issue (other than the amount involved) with respect to any other action." (Pet., p. 5a, footnotes omitted).

Among the "informal" procedures so referred to were those of a court "not ... bound by ... rules of ... evidence" (New York City Civil Court Act §1804). The "express statutory provision" referred to by the New York Court of Appeals is New York

City Civil Court Act §1808, which provides "A judgment obtained under this article may be pleaded as res judicata only as to the amount involved in the particular action and shall not otherwise be deemed an adjudication of any fact at issue or found therein in any other action or court."

In short, the realities of small claims litigation are such that it is the public policy of the State of New York that the "inconsistent" adjudications cited to this Court are worthless for any purpose other than the disposition of the amounts involved in the claims therein. They are "not otherwise [to] be deemed an adjudication of any fact at issue or found therein in any other action or court." Thus petitioner in effect requests this Court to consider substituting its judgment for that of New York's highest court in regard to the inherent worth of an inferior state court determination as an adjudication of fact.

Petitioner's strong incentive and advantaged position for defense in Food Pageant.

Compare the motivations and abilities of the pro se plaintiffs in the small claims cases with those of petitioner in the New York Supreme Court action, Food Pageant. The Court is told that Food Pageant involved asserted damages of $81,000 (Pet., p. 3), an oblique reference to the comments in Park Lane Hosiery Co. v. Shore, (439 U.S. 322 at 330) regarding incentive to defend vigorously. What the Court has not been told is that within a week of the blackout, which began on the night of July 13, 1977, two class-action lawsuits had been filed, "one seeking $1 billion in damages" from Con Ed and the other, naming Con Ed and the City, "seeking an unstated amount in damages". By September of 1977 some 18,000 Con Ed customers had filed claims "asking for millions of dollars in damages, mostly for food spoilage".

When the case went to trial, more than a dozen years had passed since B.R. DeWitt, Inc. v.

Hall, 19 NY2d 141, 225 N.E.2d 225 (1967), sanctioned the use of collateral estoppel offensively; and Hart v. American Airlines, Inc., 61 Misc 2d 41, 304 N.Y. Supp 2d 810 (Sup. Ct., 1969), had soon applied B.R. DeWitt to multiple claims arising out of a passenger airplane crash. A maximum defense effort was clearly indicated.

Just as there was incentive for maximum defense, petitioner was superbly equipped to mount it. There was no contradiction of the following averment in the principal affidavit submitted in support of plaintiffs' motion for summary judgment:

> Con Edison was in a uniquely advantageous position to prepare its defense in the Food Pageant action. Most of the principal witnesses with respect to the events surrounding the blackout were either its employees or those of the New York Power Pool (of which Con Edison is a member). Similarly, the bulk of the documentation respecting those events was in the possession of Con Edison or the New York Power Pool. Further, at the time of the Food Pageant trial, Con Edison had already completed its own investigation into the cause of the blackout and had also participated in a series of City, State and federal investigations and hearings concerning the matter."

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The last of the three reports here referred to by petitioner (Pet., p. 4) had been filed in January of 1978. Trial in Food Pageant was not to begin until April of 1979.

The sham hint of error in Food Pageant

Petitioner asserts that in Food Pageant it was prevented from presenting evidence of "exculpatory circumstances tending to show that the blackout resulted from causes beyond [its] control." It refers to its trial counsel's opening to the jury wherein he referred to "certain substantial physical, political and financial restraints which influence the system reliability of Con Edison; and that these restraints included the failure of the City of New York to allow Con Edison to build plants in the City." (Pet., p. 3)

However, the Food Pageant record reveals no effort to introduce specific evidence of the restraints. No offer of proof was made. When the adverse judgment was appealed to New York's intermediate appellate court, which had power to

reverse not only for error of law, but also, in the exercise of discretion, in the interest of justice, the matter was not mentioned. Petitioner's brief to that court was signed and argued by a lawyer well-known to be able and experienced in appeals from judgments entered after trial of negligence cases.

Moreover, the "restraints" here mentioned were unrelated to the basis upon which petitioner was held liable in Food Pageant. There, the New York Court of Appeals wrote (52 NY2d, at 173-174, 429 N.E.2d, at pp. 740-741):

> In support of its contention that defendant had acted with gross negligence, plaintiff alleged and proved the existence of several circumstances under defendant's control which could have contributed to the eventual blackout. It was well within the competence of the jury to evaluate defendant's actions based upon the factual presentation alone. Chief among these actions was the behavior or lack of action of Con Edison's system operator on the night of the blackout. Within seven minutes of the initial lightning bolt which struck the Con Edison system at 8:37 P.M., the New York Power Pool was in communication with Con Edison's employee, William Jurith. Under the agreement between the power pool and Con Edison, during times of major emergency the utility was to put into effect the directions of the senior pool dispatcher. Following the second lightning bolt the pool directed Jurith to reduce voltage by "shedding

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load". Prior to the blackout, which occurred at approximately 9:30 P.M., several similar requests were made by the power pool to Con Edison to shed load. It was charged, with support in the record, that these directions were not complied with. The actions of Con Edison's employees on the night of the blackout, and Con Edison's staffing decisions, could properly be judged by the members of the jury unaided by expert testimony to clarify the standard of care.

CONCLUSION

The Petition Should Be Denied.

January 17, 1985.

Respectfully submitted,

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Attorney for Respondents.

LEONARD KOERNER,
ALFRED WEINSTEIN,
of Counsel.

Office-Supreme Court, U.S.
FILED
JAN 29 1985
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CLERK

(4)

No. 84-757

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,

Petitioner,

—against—

SEYMOUR GILLMAN, TRUSTEE IN BANKRUPTCY FOR SHERRY TOBACCO COMPANY, INC., and CLAREMONT-MADISON TOBACCO CORP.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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January 21, 1985

QUESTION PRESENTED

Did the Court of Appeals of the State of New York properly "reject as wholly without merit Con Edison's assertion that to apply third-party issue preclusion would be to deprive it of the due process to which it is constitutionally entitled" (62 N.Y.2d at 558) under the Fourteenth Amendment to the Constitution of the United States?

PARTIES BELOW

The party to the proceeding in the court below, in addition to the petitioner, was Seymour Gillman, Trustee in Bankruptcy for Sherry Tobacco Company, Inc. and Claremont-Madison Tobacco Corp.

The parties to the two separate but related proceedings in the court below, in addition to petitioner, were the following respondents: (i) Edward I. Koch, as Mayor of the City of New York, The

City of New York, New York City Health and Hospitals Corporation, New York City Off Track Betting Corporation, Board of Education of the City of New York, Board of Higher Education, City University of New York, New York City Housing Authority, Triborough Bridge and Tunnel Authority, New York City Transit Authority, Staten Island Rapid Transit Authority, Metropolitan Transportation Authority, The Long Island Railroad Company, Metropolitan Suburban Bus Authority, and Consolidated Rail Corporation; and (ii) Morris Goldstein and Ruth Goldstein.

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STATEMENT OF THE CASE

Seymour Gillman is the Trustee in Bankruptcy of both Sherry Tobacco Company, Inc. and Claremont-Madison Tobacco Corp., both of which were adjudicated bankrupt on or about November 2, 1977 in the United States District Court for the Southern District of New York. The bankrupts maintained their offices and warehouse at 2040 Harrison Avenue, Bronx, New York.

Beginning at approximately 9:30 P.M. on July 13, 1977, electrical power to 2040 Harrison Avenue, Bronx, New York ceased, and the "1977 Blackout" of all five boroughs of New York City and Westchester County commenced. Power was not restored until 25 hours later on July 14, 1977.

During the 25 hours of blackout, the bankrupts' businesses were destroyed by the looting and vandalism which took

place under cover of the darkness created thereby.

The Trustee in Bankruptcy commenced this action in the Supreme Court of the State of New York, County of New York, against Con Edison on or about September 17, 1978, seeking to recover damages sustained by the bankrupts which were forced out of business as a result of the vandalism and looting during the blackout. The Supreme Court, New York County, entered an order on August 26, 1982 granting the Respondent's motion for partial summary judgment on the issue of Con Edison's culpability for gross negligence on the theory of collateral estoppel (see Appendix to Petition for a Writ of Certiorari,p.72a).

The Appellate Division, First Department, affirmed on June 30, 1983 (95 A.D.2d 988), and the Court of Appeals of the State of New York unanimously

affirmed the decision of the Appellate Division on June 14, 1984 (62 N.Y.2d 936).

REASONS FOR DENYING THE WRIT

PETITIONER HAS FAILED TO ESTABLISH THAT IT WAS DENIED DUE PROCESS OF LAW.

The unanimous decision by the court of appeals held "that the prior determination in Food Pageant[1] with respect to Con Edison's liability for gross negligence in connection with the 1977 blackout is binding and conclusive on Con Edison in this action" (62 N.Y. 2d at 558). Con Edison disputes this decision on the grounds that there exist other judicial determinations contrary to Food Pageant, and thus it was unfair to Con Edison to preclude it, under the doctrine of collateral estoppel, from relitigating the issue of gross negligence.

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1 Food Pageant, Inc. v. Consolidated Edison Co., 54 N.Y.2d 167 (1981).

Con Edison argues that since the Food Pageant decision which is relied upon as a basis for the estoppel, is itself inconsistent with other legal determinations, this unfairness denies it the constitutional guaranty of due process.

The five inconsistent decisions, on which Con Edison sought to rely in the court of appeals and in this petition for a writ of certiorari, all arose out of cases tried in the Small Claims Part of the Civil Court of New York City.[2]

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2 Finkelstein v. Consolidated Edison Co.,N.Y.L.J.,May 1, 1979,p.13,col. 3 (Sup.Ct.App.T.2d Dep't 1979); Lee v. Consolidated Edison Co., 95 Misc.2d 120 (N.Y.C.Civ.Ct.N.Y.Co. 1978), rev'd on other grounds, 98 Misc.2d 304 (Sup.Ct.App.T.1st Dep't 1978); Lehman v. Consolidated Edison Co., N.Y.L.J.,March 25,1980, p.10,col.6 (Sup.Ct.App.T.2d Dep't 1980); Lo Vico v. Consolidated Edison Co., 99 Misc.2d 897 (Sup.Ct.App.T. 2d Dep't 1979); Penichet v. Consolidated Edison Co.,N.Y.L.J.,May 1,1980, p.7,col.2 (Sup.Ct.App.T.1st Dep't 1980).

As noted by the court of appeals, cases tried in Small Claims Part are governed by "informal and simplified procedures" and "by express statutory provision are not to be deemed an adjudication of any fact at issue (other than the amount involved) with respect to any other action" (62 N.Y.2d at 556). Thus, these decisions arising under Small Claims Part were not regarded as being "of like judicial stature" with Food Pageant, and therefore the contention of Con Edison based on such inconsistent judgments was dismissed. The court of appeals specifically reserved for a later time "the effect properly to be given to inconsistent determinations of like judicial stature..." (62 N.Y.2d at 555-556).

The two principal decisions cited by Con Edison in its petition are Parklane Hosiery Co. v. Shore, 439 U.S.

322 (1979) and State Farm Fire & Casualty Co. v. Century Home Components, Inc., 275 Or. 97, 550 P.2d 1185 (1976). By way of dictum, this Court in Parklane referred to the possibility of unfairness to a defendant resulting from the application of offensive collateral estoppel in situations of inconsistent judgments (439 U.S. at 330). The facts in Parklane did not, however, involve inconsistent judgments. The Court there held that the defendants were collaterally estopped by the earlier judgment in the District Court action brought by the Securities and Exchange Commission (SEC), since defendant had a "full and fair" opportunity to litigate their claims in the SEC action. In sum, the court of appeals followed Parklane in its decision below. Having found that there were no inconsistent determinations of like judicial stature and that Con Edison had

had a "full and fair opportunity to litigate the issue" in Food Pageant, the court of appeals applying Parklane held that the prior determination in Food Pageant "is binding and conclusive on Con Edison in this action" (62 N.Y. 2d at 558).

The Oregon case cited by Con Edison did involve inconsistent judgments arising out of a fire, but unlike this case, there was no suggestion in the State Farm Fire & Casualty decision that the multiple judgments there involved were not of "like judicial stature." The Oregon court held that it would be unfair to preclude the defendant from relitigating the liability issue because of the existence of prior inconsistent determinations. State Farm Fire & Casualty Co. v. Century Home Components, Inc., 275 Or. 97, 550 P.2d 1185 (1976).

Since there are no "previous judgments" inconsistent with the judgment in Food Pageant, which is relied upon as a basis for the offensive collateral estoppel, no issue of "unfairness," i.e., "due process," arises from the application of offensive collateral estoppel in this case. Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979).

On yet another ground, Con Edison should not be heard to raise this issue of denial of due process. The New York City Civil Court Act provides for informal and simplified procedures to be applied in cases tried in Small Claims Part. Section 1806 of the Civil Court Act gives either party to an action upon a small claim the right to demand a trial by jury in the regular part of the civil court. Had Con Edison desired to ensure that all proceedings against it

growing out of the 1977 blackout be conducted in accordance with the customary court procedures and practices required by the constitutional guaranty of due process, Con Edison should have demanded, in each case sought to have been brought in the Small Claims Part, e.g., the five alleged inconsistent decisions cited supra note 2, a trial by jury in the regular part of the civil court. Having failed to do so, Con Edison cannot now be heard to complain that disregard of these five small claim decisions by the court of appeals here in the application of offensive collateral estoppel, was a violation of due process to which Con Edison is constitutionally entitled.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

January 21, 1985

Respectfully submitted,

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Attorney for Respondent

Of Counsel:

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No. 84-757 (5)

Supreme Court, U.S.
FILED
FEB 1 1985
ALEXANDER L. STEVAS
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Petitioner,

—against—

EDWARD I. KOCH, as Mayor of the City of New York, THE CITY OF NEW YORK, NEW YORK CITY HEALTH AND HOSPITALS CORPORATION, NEW YORK CITY OFF-TRACK BETTING CORPORATION, BOARD OF EDUCATION OF THE CITY OF NEW YORK, BOARD OF HIGHER EDUCATION, CITY UNIVERSITY OF NEW YORK, NEW YORK CITY HOUSING AUTHORITY, TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, STATEN ISLAND RAPID TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, THE LONG ISLAND RAILROAD COMPANY, METROPOLITAN SUBURBAN BUS AUTHORITY, and CONSOLIDATED RAIL CORPORATION,
Respondents.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Petitioner,

—against—

MORRIS GOLDSTEIN and RUTH GOLDSTEIN,
Respondents.

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Petitioner,

—against—

SEYMOUR GILLMAN, Trustee in Bankruptcy for SHERRY TOBACCO COMPANY, INC., and CLAREMONT-MADISON TOBACCO CORP.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Con Edison's petition, according to the Koch respondents (Koch Br. 1), "ignores the relative quality" of the several judicial findings that found that Con Edison was not grossly negligent in causing the 1977 blackout and that its conduct was at most ordinary negligence or an error in judgment.[1] The jury verdict to the contrary in *Food Pageant, Inc.* v. *Consolidated Edison Co.*, 54 N.Y.2d 167 (1981), was the first and only finding against Con Edison. The Koch respondents attempt to belittle the judicial findings because they were based on official investigative reports, which "would not be admitted into evidence under normal rules" (Koch Br. 2). They also imply that the records upon which the findings exonerating Con Edison were made were not "substantially similar to that in *Food Pageant*" (*Ibid.*).

In point of fact, the principal investigative report, N.M. Clapp's *State of New York Investigation of the New York City Blackout July 13, 1977* (January 1978) ("*Clapp Report*"), reflects an impressive factual record arguably superior to any that could be developed in the context of normal adversary proceedings.[2] The *Clapp Report* provided the script for the

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1 *Lee* v. *Consolidated Edison Co.*, 95 Misc.2d 120 (N.Y.C. Civ. Ct. N.Y. Co. 1978), *rev'd on other grounds*, 98 Misc.2d 304 (Sup. Ct. App. T. 1st Dep't 1978) (*per curiam*); *Lo Vico* v. *Consolidated Edison Co.*, 99 Misc.2d 897 (Sup. Ct. App. T. 2d Dep't 1979) (*mem.*); *Finkelstein* v. *Consoldiated Edison Co.*, N.Y.L.J., May 1, 1979, p. 13, col. 3 (Sup. Ct. App. T. 2d Dep't 1979); *Lehman* v. *Consolidated Edison Co.*, N.Y.L.J., March 25, 1980, p. 10, col. 6 (Sup. Ct. App. T. 2d Dep't 1980); *Penichet* v. *Consolidated Edison Co.*, N.Y.L.J., May 1, 1980 p. 7, col. 2 (Sup. Ct. App. T. 1st Dep't 1980).

2 On July 22, Governor Hugh L. Carey issued Executive Order No. 54, *reprinted in* 9(A) N.Y.C.R.R. § 3.54, requesting the Public Service Commission to appoint Norman M. Clapp to conduct the State's investigation of the 1977 blackout and delegating to Mr. Clapp the investigative powers of a Public Service Commissioner. *Clapp Report*, *supra*, at 2. The law firm of Cleary, Gottlieb, Steen & Hamilton was selected as general counsel, and Charles P. Alman, Jr., former Chief of

plaintiff's trial of its case in *Food Pageant*, and the *Food Pageant* record is essentially the agreement of the plaintiff's expert with the conclusions of the *Clapp Report*.

The consideration of the *Clapp Report* and the other investigative reports by the justices of the Civil Court and the Supreme Court justices who sit at Appellate Term rebuts the contention of the Koch respondents that the judicial findings in Con Edison's favor were based on such inadequate records as to be "worthless" (Koch Br. 4).

The findings in Con Edison's favor did not result from any deficiency in presentation by *pro se* plaintiffs. In *Lee, Lo Vico* and *Lehman*, the courts themselves analyzed the investigative reports. In *Lee* and *Lo Vico*, which involved claims for food spoilage, the New York State Food Merchants Association, Inc., a trade association numbering among its members the largest retail food chains in the State of New York as well as Food Pageant, Inc., appeared and filed briefs as *amicus curiae*.

The Goldstein and Gillman respondents also try to dismiss the findings in Con Edison's favor, distinguishing *State Farm Fire & Casualty Co.* v. *Century Home Components, Inc.*, 275 Or. 97, 550 P.2d 1185 (1976), on the ground that "there was no suggestion in th[at] decision that the multiple judgments there

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Power Systems Operations for the Tennessee Valley Authority, former member of the Advisory Panel of the Federal Power Commission on its investigation of the North-East Power Interruption of 1965 and Vice Chairman of the Federal Power Commission Advisory Committee on Reliability of Electric Bulk Power Supply, was retained as Technical Consultant. "Under procedural guidelines . . . patterned after the procedures of legislative investigative hearings, six full days of hearings were held, 33 witnesses were called and heard, 1,545 pages of testimony were transcribed and 50 exhibits were filed." *Id.* at 4. In addition, other agencies conducting related investigations shared their data and records, and the investigation's technical consultant made on-site personal inspection visits to Con Edison's facilities. *Ibid.* "Although the Public Service Commission . . . supplied budgetary and staff support as requested, the investigation [w]as . . . conducted independently of Commission control or direction." *Id.* at 3. The *Clapp Report* details the findings of the investigation.

involved were not of 'like judicial stature' (Gillman Br. 7; *see also* Goldstein Br. 14). In *State Farm*, however, the one judgment in favor of the defendant (which had not been reviewed by any appellate court) was based upon a more meager factual record than the two judgments in favor of plaintiffs (which had been affirmed by the high court itself), and the Oregon Supreme Court pointedly

> "decline[d] the invitation to decide which case was the better tried, in which case the evidence more truly presented the facts, and which 'full and fair opportunity' by defendant resulted in the 'correct' decision. The existence of conflicting determinations of similar issues demonstrates that different bodies can legitimately draw different conclusions. As noted previously, the application of collateral estoppel is a matter of policy, not a quest for certainty." 275 Or. at 114, 550 P.2d at 1194.

The Koch respondents also disingenuously assert that Con Edison is making an "oblique reference" to its "incentive to defend vigorously" the *Food Pageant* suit by apprising the Court of the amount of damages there in issue (Koch Br. 5). The Koch respondents are trying to deflect attention from the fact that the jury's verdict split claimed damages totalling $81,000 precisely in half and awarded the plaintiff $40,500. Such indications of compromise undermine confidence that the jury's appraisal of the gross negligence in *Food Pageant* was substantially correct. *See, e.g., Restatement (Second) of Judgments* § 29, Comment g and Illustration 7 (1982). Once a jury is convinced that the defendant has been guilty of some degree of negligence, the temptation to compensate the victim is undoubtedly great, inviting "a reciprocal relinquishment of convictions upon liability and damages in order to arrive at a verdict." *Lallo* v. *W.T. Grant Co.*, 31 A.D.2d 941, 942 (2d Dep't 1969) (*mem.*).[3]

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3 The difference between ordinary and gross negligence is, of course, a matter of degree. Under New York law, the narrow line separating the two "is oftentimes shadowy and unsatisfactory." *Dalton* v. *Hamilton Hotel Operating Co.*, 242 N.Y. 481, 487 (1926). The issue of gross

Moreover, the fact that the claim in *Food Pageant*, the jury's verdict and the ultimate judgment were small in absolute terms and particularly so in comparison with the aggregate of over $200 million in claims against Con Edison (now some $123 million in more than 300 actions) highlights the fundamental unfairness of permitting the *Food Pageant* verdict to be the ultimate determinant of Con Edison's culpability *vis-à-vis* the 1977 blackout. Justice Sandler's dissent in *Goldstein* v. *Consolidated Edison Co.*, 93 A.D.2d 589, 597, 600 (1st Dep't 1983) (56a, 59a-60a), voiced this concern, among others:

> "I have been unable to find a single reported decision anywhere in the country in which issue preclusion was sustained under circumstances remotely comparable to those here.
>
> * * *
>
> "It seems to me of doubtful fairness to confront any litigant, even one as large as Consolidated Edison, with such an immense gulf between the benefit to be derived from a successful outcome in a lawsuit and the detriment to be suffered from an adverse determination. At a minimum, the presence of such a circumstance demands a very close judicial scrutiny of the first verdict to make certain that it is in fact just to give it such disproportionate consequences." (Citation omitted.)

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negligence is thus peculiarly susceptible to "varying appraisals of the facts by different juries," and the impropriety of applying collateral estoppel to issues that are "subject to varying appraisals" has often been recognized. *Divine* v. *Commissioner*, 500 F.2d 1041, 1047-1048 (2d Cir. 1974), *citing, inter alia*, *Berner* v. *British Commonwealth Pacific Airlines, Ltd.*, 346 F.2d 532, 541 (2d Cir. 1965), *cert. denied*, 382 U.S. 983 (1966) ("wilful misconduct" under Warsaw Convention), and *Fink* v. *Coates*, 323 F. Supp. 988, 990 (S.D.N.Y. 1971) ("tort actions involving falsity, materiality, and scienter").

CONCLUSION

The writ of certiorari should issue.

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Respectfully submitted,

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